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No. 10303

Vol
2328

United States
Circuit Court of Appeals

For the Ninth Circuit.

WASHINGTON BREWERS INSTITUTE, et al.,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the Western District of Washington,
Northern Division

November Term 1940
No. 45509

UNITED STATES OF AMERICA,

Plaintiff,
vs.

THE WASHINGTON BREWERS INSTITUTE;
CALIFORNIA STATE BREWERS INSTITUTE;
IDAHO BREWERS INSTITUTE,
INC.; BREWERS INSTITUTE OF OREGON;
BOHEMIAN BREWERIES, INC.;
COLUMBIA BREWERIES, INC.; GOLDEN
AGE BREWERIES, INC.; INTERSTATE
BREWERY COMPANY; OLYMPIA BREW-
ING COMPANY; PIONEER BREWING
COMPANY; SEATTLE BREWING &
MALTING COMPANY; THE SPOKANE
BREWERY, INC.; ACME BREWERIES;
PACIFIC BREWING & MALTING COM-
PANY; REGAL AMBER BREWING COM-
PANY; RAINIER BREWING COMPANY;
GOLDEN WEST BREWING COMPANY;
SAN FRANCISCO BREWING CORPORA-
TION; BECKER PRODUCTS COMPANY;
EAST IDAHO BREWING, INC.; OVER-
LAND BEVERAGE COMPANY, INC.;
GREAT FALLS BREWERIES, INC.;

BLITZ-WEINHARD COMPANY; SALEM BREWERY ASSOCIATION; HENRY T. IVERS; HERBERT J. DURAND; PETER G. SCHMIDT; EDWIN F. THEIS; WILLIAM H. MACKIE; KARL F. SCHUSTER; JOSEPH E. KNAPP; WILLIAM P. BAKER; JOSEPH GOLDIE; JAMES G. HAMILTON; CHARLES H. LURMANN; STEVE T. COLLINS; HENRY W. WESSINGER; GEORGE W. STACKMAN; GEORGE F. PAULSEN; RENE BESSE; JOSEPH F. LANSER; HARRY R. LAWTON; G. V. UHR; ADOLPH D. SCHMIDT; RUSSELL G. HALL; EMIL G. SICK; GEORGE W. ALLEN; ARNOLD WARK; MORRIS ROSAUER; LOUIS T. BRAVOS; JOSEPH M. ROTHCCHILD; GUS L. BECKER; C. C. WILCOX; E. LOUIS POWELL; LOUIS MATHIAS and ARMAND J. RAVETTI,

Defendants.

INDICTMENT

United States of America,
Western District of Washington,
Northern Division—ss.

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [3]

COUNT ONE

Period of Time Covered by This Indictment

1. Each allegation in this indictment made that an act has been performed by any of the defendants herein shall be deemed to be an allegation that such act was performed within the three years next preceding the date of the return of this indictment unless otherwise expressly stated.

Definition of Terms

2. The term "breweries" as used in this indictment means those companies and individuals engaged in the business of manufacturing beer.

3. The term "wholesalers" as used in this indictment means those companies and individuals engaged in the business of purchasing beer from breweries and selling the same to retailers.

4. The term "importers" as used in this indictment means those companies and individuals who purchase and receive beer from sources outside of the State or Territory in which such companies and individuals are engaged in business and who sell such beer to wholesalers and retailers in the State or Territory in which they are doing business.

5. The term "distributors" as used in this indictment means wholesalers, importers and companies and individuals acting as agents for breweries in the sale and distribution of beer.

6. The term "retailers" as used in this indictment means those companies and individuals en-

gaged in the business of purchasing beer from wholesalers, importers and distributors and selling same to consumers.

7. The term "beer" as used in this indictment means any beverage obtained by the alcoholic fermentation of an infusion or decoction of pure hops, or pure extract of hops and pure barley malt or other wholesome grain or cereal in water and for the purposes of this indictment said term "beer" shall include the alcoholic malt beverage commonly known as ale.

8. The term "Pacific Coast Area" as used in this indictment [4] indicates those territories comprised within the States of Washington, California, Idaho, and Oregon.

The Defendants

9. The following named institutes, hereinafter sometimes referred to as defendant associations, are hereby indicted and made defendants herein. Each of said associations is a non-profit corporation or association duly organized and existing and authorized to do business under and by virtue of the laws of the State of incorporation or organization as indicated below and with principal place of business as indicated below. Membership in each of said associations has been and now is composed of companies directly, and through subsidiaries and affiliates, engaged in the manufacture, distribution, and sale of beer.

Name of Institute	State of Organization or Incorporation	Principal Place of Business
The Washington Brewers Institute	Washington	Seattle, Washington.
California State Brewers Institute	California	San Francisco, California.
Idaho Brewers Institute, Inc.	Idaho	Boise, Idaho.
Brewers Institute of Oregon	Oregon	Portland, Oregon.

Said associations (hereinafter sometimes referred to, for purposes of brevity and differentiation, as Washington Association, California Association, Idaho Association, and Oregon Association, respectively) were organized for the purpose of promoting the sale, use, and consumption of beer as a beverage and of fixing and stabilizing the sale prices of beer.

10. The following named companies, hereinafter sometimes referred to as defendant companies, are hereby indicted and made defendants herein. Each of said companies is a corporation duly organized and existing and authorized to do business under and by virtue of the laws of the State of incorporation and with principal place of business as indicated below. At all times and dates herein mentioned [5] each of said defendant companies, directly and through subsidiaries and affiliates, has been and is engaged in the manufacture, distribution and sale of beer and said defendant companies have been and now are members of the respective defendant associations as indicated below:

Name of Company	State of Incorporation	Principal Place of Business	Association Membership
Bohemian Breweries, Inc.	Washington	Spokane, Washington	Washington, Idaho and Oregon
Columbia Breweries, Inc.	Washington	Tacoma, Washington	Washington, Idaho and Oregon
Golden Age Breweries, Inc.	Washington	Spokane, Washington	Washington, Idaho and Oregon
Interstate Brewery Company	Washington	Vancouver, Washington	Washington and Oregon
Olympia Brewing Company	Washington	Olympia, Washington	Washington and Oregon
Pioneer Brewing Company	Washington	Aberdeen, Washington	Washington and Oregon
Seattle Brewing & Malting Company	Washington	Seattle, Washington	Washington and Oregon
The Spokane Brewery, Inc.	Washington	Spokane, Washington	Washington, Idaho and Oregon
Acme Breweries	California	San Francisco, California	California, Idaho and Oregon
Pacific Brewing & Malting Company	California	San Francisco, California	California and Oregon

Name of Company	State of Incorporation	Principal Place of Business	Association Membership
Regal Amber Brewing Company	California	San Francisco, California	California
Rainier Brewing Company	California	San Francisco, California	California and Oregon
Golden West Brewing Company	California	Oakland, California	Oregon
San Francisco Brewing Corporation	California	San Francisco, California	California
Becker Products Company	Utah	Ogden, Utah	Idaho
East Idaho Brewing, Inc.	Idaho	Pocatello, Idaho	Idaho
Overland Beverage Company, Inc.	Idaho	Nampa, Idaho	Idaho
Great Falls Breweries, Inc.	Montana	Great Falls, Montana	Idaho
Blitz-Weinhard Company	Oregon	Portland, Oregon	Oregon and Idaho
Salem Brewery Association	Oregon	Salem, Oregon	Oregon

[6]

11. The following named individuals, herein-after sometimes referred to as the individual defendants, are hereby indicted and made defendants herein. Each of said individuals now occupies the respective position with defendant associations and defendant companies and now resides at the respective address as indicated below:

Name	Position	Residence
Henry T. Ivers	Chairman, Washington Association	Seattle, Washington
Herbert J. Durand	Secretary and Manager, Washington Association	Seattle, Washington
Peter G. Schmidt	President and Director, Olympia Brewing Company; First Vice Chairman, Washington Association; and Director, Oregon Association	Olympia, Washington
Edwin F. Theis	President and Director, Bohemian Breweries, Inc. and Second Vice Chairman, Washington Association	Spokane, Washington
William H. Mackie	Secretary and Treasurer, Seattle Brewing & Maltинг Company; Director, The Spokane Brewery, Inc.; and Treasurer, Washington Association	Seattle, Washington
Karl F. Schuster	President, California Association and President and Director, Aeme Breweries	San Francisco, California

Name	Position	Residence
Joseph E. Knapp	President and Director, Pacific Brewing & Malt-ing Company and Second Vice President, California Association	San Francisco, California
William P. Baker	President and Director, Regal Amber Brewing Company and Third Vice President, California Association	San Francisco, California
Joseph Goldie	President and Director, Rainier Brewing Company, and Treasurer, California Association	San Francisco, California
James G. Hamilton	Secretary, California Association	San Francisco, California
Charles H. Lurmann	Director, California Association and Treasurer and Director, San Francisco Brewing Corpora-tion	San Francisco, California
Steve T. Collins	President, Secretary and Treasurer, Idaho Association and Manager, Branch Office and Plant of Bohemian Breweries, Inc., at Boise, Idaho	Boise, Idaho
Henry W. Wessinger	President and Director, Blitz - Weinhard Com-pany and President and Director, Oregon Asso-ciation	Portland, Oregon
George W. Stackman	Vice-President and Di-rector, Oregon Associa-tion and President and Director, Salem Brew-ery Association	Salem, Oregon

[7]

Name	Position	Residence
George F. Paulsen	Secretary, Oregon Association	Portland, Oregon
Rene Besse	Director, Oregon Association and formerly General Manager, The Spokane Brewery, Inc.	Silver City, New Mexico
Joseph F. Lansen	President and Sales Manager, Columbia Breweries, Inc. and Vice-President and Director, East Idaho Brewing, Inc.	Tacoma, Washington
Harry R. Lawton	Vice-President and Secretary, Columbia Breweries, Inc.	Medina, Washington
G. V. Uhr	Secretary-Treasurer and Director, Interstate Washington Brewery Company	Vancouver, Washington
Adolph D. Schmidt	Vice-President and Director, Olympia Brewing Company	Olympia, Washington
Russell G. Hall	President, Pioneer Brewing Company	Aberdeen, Washington
Emil G. Sick	President and Director, Seattle Brewing & Malting Company; President and Director, The Spokane Brewery, Inc.; and President and Director, Great Falls Breweries	Seattle, Washington
George W. Allen	Vice-President, Manager and Director, Seattle Brewing & Malting Company, and Director, The Spokane Brewery, Inc.	Seattle, Washington

[8]

Name	Position	Residence
Arnold Wark	Sales Manager, Seattle Brewing & Malting Company	Seattle, Washington
Morris Rosauer	Former Vice-President and General Manager, Golden Age Breweries, Inc.	Spokane, Washington
Louis T. Bravos	Sales Manager, Acme Breweries	San Francisco, California
Joseph M. Rothchild	Vice - President, Blitz-Weinhard	Portland, Oregon
Gus L. Becker	President and Treasurer, Becker Products Company	Ogden, Utah
C. C. Wileox	Sales Manager, Becker Products Company	Ogden, Utah
E. Louis Powell	Former President, Idaho Association and Former President, East Idaho Brewing, Inc.	Pocatello, Idaho
Louis Mathias	Vice-President, Overland Beverage Company, Inc.	Nampa, Idaho
Armand J. Ravetti	Former Employee and Agent, Washington Association, and Supervisor, "Field Service Bureau", Washington Association	Seattle, Washington

12. Whenever in this indictment reference is made to any act, deed or transaction on the part of defendant associations, or any of them, it shall be deemed to be and shall be an allegation that such act, deed or transaction was performed or commit-

ted by said association at the instigation and behest and under the direction, domination, and control of the officers, trustees, directors, agents and members of said association. And whenever in this indictment reference is made [9] to any act, deed or transaction on the part of defendant companies, or any of them, it shall be deemed to be and shall be an allegation that the directors, officers, agents and employees of the respective companies, and their subsidiaries and affiliates, authorized, ordered, or performed such act, deed, or transaction for and on behalf of their respective companies while actively engaged in the management, direction and control of its affairs.

13. At all times and dates herein mentioned the defendant associations have been and now are controlled and dominated by the defendant companies and the defendant individuals.

14. Whenever in this indictment initials are used to describe and identify any individual defendant, the Christian or given name of such individual defendant is to the grand jurors unknown.

Nature and Extent of Trade and Commerce Involved

15. The business of manufacturing and distributing beer in the Pacific Coast Area is one of vast proportions. In the year 1940, over three and one-half million barrels of beer, each barrel containing thirty-one gallons, having a value in excess of \$70,000,000, were consumed in said Area. Approximately 10% of the beer consumed in said Pacific

Coast Area in the year 1940 was shipped into said Area in interstate trade and commerce from States of the United States other than the States included within the Pacific Coast Area. Approximately 90% of the beer consumed within the Pacific Coast Area in the year 1940 was manufactured in the four States comprising said Area, the greater portion thereof being manufactured by breweries having plants located in the States of Washington and California. Substantial quantities of beer are sold and shipped in interstate trade and commerce by breweries having plants located within each of the States comprising the Pacific Coast Area to importers and distributors of such beer doing business in each of the other States comprising the said Pacific Coast Area, for distribution and consumption therein. Approximately 55% of the beer consumed in the State of Oregon is sold to importers and distributors [10] of such beer doing business within said State and is shipped into said State in interstate commerce by breweries having plants located in the States of Washington and California, for distribution and consumption in said State of Oregon. Approximately 50% of the beer consumed in the State of Idaho is sold to importers and distributors of such beer doing business within said State and is shipped into said State in interstate trade and commerce by breweries having plants located in the States of Washington and California, for distribution and consumption in said State of Idaho. Substantial quantities of beer consumed within the

State of Washington are sold to importers and distributors of beer doing business within said State and are shipped into said State in interstate trade and commerce by breweries having plants located in the other States of the Pacific Coast Area. Substantial quantities of beer consumed within the State of California are sold to importers and distributors of beer doing business within said State and are shipped into said State in interstate trade and commerce by breweries having plants located in other States of the Pacific Coast Area. In excess of 75% of the beer sold, shipped, and distributed in interstate trade and commerce in the Pacific Coast Area, as aforesaid, is manufactured and is then sold and shipped in such trade and commerce by the defendant breweries located in the various States of said Area.

The Conspiracy

16. Beginning on or about the 1st day of January 1935, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of presentation of this indictment, defendants herein, occupying a dominant and controlling position in the sale and distribution of beer in interstate trade and commerce, as aforesaid, together with other persons to the grand jurors unknown, well knowing all of the foregoing facts, have wilfully and unlawfully formed and engaged in a wrongful and unlawful combination and conspiracy to raise, fix, stabilize and maintain, uniform, artificial and non-competitive prices for beer

sold and distributed in the Pacific Coast [11] Area in interstate trade and commerce, as aforesaid, and as a part of said conspiracy, and in pursuance thereof, said defendants have arbitrarily, wilfully and unlawfully raised, fixed, stabilized and maintained uniform, artificial, and non-competitive prices in the sale of beer in interstate trade and commerce in the Pacific Coast Area as aforesaid, which combination and conspiracy has been and now is in restraint of trade and commerce among the several States of the United States in violation of Section 1 of the Act of Congress approved July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (26 Stat. 209), commonly known as the Sherman Act, said combination and conspiracy being now described in further detail, that is to say:

Means Used to Effectuate Conspiracy

17. As a part of said unlawful combination and conspiracy in restraint of interstate trade and commerce, as aforesaid, and to effectuate the purposes thereof, the defendant agreed upon and utilized by concerted action, divers means and methods, including among others the following:

(a) Defendant companies and defendant individuals caused to be organized and organized said defendant associations, to wit: The Washington Brewers Institute, California State Brewers Institute, Idaho Brewers Institute, Inc., and Brewers Institute of Oregon under the respective laws of Washington, California,

Idaho and Oregon, and said associations were thereupon and continuously thereafter utilized for the accomplishment of the objectives and purposes herein set forth and described; said associations were supported and maintained by the defendant breweries by means of assessments and dues levied upon and paid by said defendants in proportion to their respective aggregate sales in each of said States in said Pacific Coast Area.

(b) Defendants agreed upon, fixed and determined uniform, artificial and non-competitive prices to be charged for beer and [12] price levels to be stabilized and maintained for beer sold and distributed in the Pacific Coast Area in interstate trade commerce, as aforesaid, and pursuant to said combination and conspiracy said defendant breweries thereafter sold and distributed beer in interstate trade and commerce in said Area at said uniform, artificial and non-competitive prices and price levels so fixed, determined and agreed upon as aforesaid.

(c) Defendants agreed upon and established uniform and non-competitive terms and conditions of sale of beer in interstate trade and commerce in said Pacific Coast Area, and defendants included said uniform and non-competitive terms and conditions of sale in all contracts and agreements providing for the sale of beer in interstate trade and commerce as aforesaid.

said, and said defendants required all purchasers of beer to adhere to said uniform and non-competitive terms and conditions of sale.

(d) Defendants agreed upon and established classifications of purchasers of beer and the prices to be charged each such classification in the sale of beer in interstate trade and commerce in said Pacific Coast Area, and defendant breweries adhered to said classifications and said prices in their sales of beer in interstate trade and commerce in said Area, as aforesaid, and required all wholesalers, distributors, importers and retailers in said Area to adhere to said classifications and said prices.

(e) Defendants agreed upon and used uniform types of bottles, containers and packages in the sale of beer in said Pacific Coast Area, as aforesaid, and further agreed upon uniform refunds and allowances for the return of empty bottles and containers; defendants refused to grant refunds in amounts other than those which had been agreed upon and fixed, as [13] aforesaid, and required all wholesalers, distributors, importers and retailers in said Area to sell beer in such uniform types of bottles, containers and packages and refused to grant refunds for empty bottles and containers other than those so agreed upon and fixed by said defendants as aforesaid.

(f) Defendants employed agents, denominated administrators, supervisors and investi-

gators who, under defendants' instructions and on the defendants' behalf, closely supervised, checked and effectually policed the respective beer markets in cities, towns and trade areas in said Pacific Coast Area for the purpose of securing adherence to the prices and price levels fixed by defendants as aforesaid; fines and penalties were levied and collected by said agents from those failing to adhere to the prices and terms for the sale of beer fixed by the defendants as aforesaid, said fines and penalties being ostensibly imposed, however, for alleged violations of the provisions of the respective liquor control statutes and the rules and regulations promulgated by the respective liquor control board or commission or commissioner or administrator in force in the respective States of said Area, and the sums of money so collected by the defendants were not turned over to the appropriate authorities of the States in which said alleged violations of law occurred but were converted by the defendants to their own use.

(g) Defendants coerced wholesalers, distributors, importers and retailers to adhere strictly to the prices and price levels and the terms and conditions for the sale of beer agreed upon and fixed by defendants, as aforesaid, by threats that the sources of supply of beer of said wholesalers, distributors, importers and retailers would be cut off and their contracts and agree-

ments for supplies of beer cancelled should they [14] sell beer at prices below the prices and price levels established by said defendants or should they refuse to adhere in any respects to the uniform and non-competitive terms and conditions of sale of beer sold and distributed in interstate trade and commerce by said defendants as aforesaid.

(h) In order to prevent the sale of beer at prices less than those agreed upon and fixed, as aforesaid, defendant breweries agreed among themselves to repurchase, and did repurchase, from the respective wholesalers, distributors, importers and retailers of their respective beers any beer manufactured by the respective defendant breweries when the same was offered for sale by such wholesalers, distributors, importers and retailers at prices less than those agreed upon, determined and fixed as aforesaid, such repurchases being made to remove such beer (which was termed in the industry "distressed beer") from the particular market where it was being offered for sale.

(i) Under the respective laws of the States of the Pacific Coast Area relating to the manufacture, sale, distribution and consumption of alcoholic liquors and alcoholic malt beverages, there was created in each of said States a control authority known as a liquor control board or commission or commissioner or administrator, said authority being charged by statute with

the enforcement of the provisions of said laws and empowered to make all necessary and proper rules and regulations in the administration thereof. Defendants agreed upon, recommended and urged the adoption and promulgation by the respective control authority in each State of said Pacific Coast Area of rules and regulations whereby each of said States was arbitrarily divided into geographical trade areas known as "zones" and all brewers and importers of beer selling beer in said zones were required to file with said control authority [15] in each of said States price lists which were designated and known as "price postings" showing the prices at which beer manufactured by such brewers and imported by such beer importers should be sold in each of said zones; said rules and regulations prohibited the sale of beer at prices other than those so posted, and imposed penalties for failure to adhere to such posted prices; said rules and regulations further provided that prices posted in said States, as aforesaid, should not become effective until a certain period of time had elapsed after the filing thereof; and said rules and regulations further required all breweries and importers, desiring to engage in business in the sale of beer in said States in said Area, to file with the respective control authority copies of all written contracts and memoranda of oral agreements, including all terms and conditions

of sale, between breweries and wholesalers and between importers and breweries and wholesalers engaged in business in the sale of beer in said States; defendants recommended and urged the adoption of said zones and said price posting rules and regulations by the liquor control authority in each State as aforesaid so that said zoning and price posting systems could be utilized by the defendants to further and effectuate their unlawful scheme and conspiracy to raise, fix, make uniform, and maintain arbitrary and non-competitive prices and terms and conditions of sale of beer in the Pacific Coast Area as aforesaid.

(j) Defendants held frequent and periodic meetings at which they agreed upon, determined and fixed artificial and non-competitive zone prices, uniform within each zone, to be posted with each of said control authorities of the Pacific Coast Area and to be charged in each of the respective zones of each of [16] said States for beer sold in said States and the respective zones thereof.

(k) Defendant breweries, instead of filing their price lists or price postings with the respective liquor control authorities in the Pacific Coast Area as contemplated by law in force in said States, from time to time sent their price lists and price postings to each other and to the defendant associations, and defendant breweries requested said associations to file

prices for the respective defendant breweries with the respective liquor control authorities in the respective States in the Pacific Coast Area; and under instructions from the defendant companies and individual defendants said associations made said price postings uniform for all defendant breweries filing prices for particular zones, that is to say, defendant breweries from time to time sent tentative lists of price postings to the respective associations with instructions to conform such price postings so submitted to the uniform prices agreed upon by defendants for each of said zones, and said associations complied with said instructions and whenever necessary conformed and changed such prices so submitted by defendant breweries so as to make them all uniform in each such zone, and when filed and posted by defendant associations with the respective liquor control authorities said prices of the defendant breweries were in fact all uniform and non-competitive in each of said zones.

(1) Defendants sold beer in the Pacific Coast Area in interstate trade and commerce at the prices and upon the terms and conditions of sale so agreed upon and fixed and determined and posted as aforesaid.

(m) Defendant breweries withheld and suspended shipment of beer to wholesalers, distributors, importers and retailers of beer who [17] failed to adhere in their sales of beer to

prices and price postings agreed upon, fixed and posted by defendants as aforesaid.

(n) Defendants attempted to induce and did induce breweries located in States of the United States outside of the Pacific Coast Area to sell beer in interstate trade and commerce in said Area at the prices and price levels arbitrarily fixed, determined, agreed upon and posted by the defendants as aforesaid.

(o) Defendants attempted to induce and did induce breweries located in States of the United States outside of the Pacific Coast Area to refrain from selling beer in interstate trade and commerce to wholesalers, distributors, importers and retailers located in such Area who had failed to adhere to the prices and price levels agreed upon, fixed and posted as aforesaid.

(p) Defendants have utilized said defendant associations as instrumentalities for the collection and exclusive dissemination among themselves of statistical data and information as to all phases of the beer industry in the Pacific Coast Area and such information has materially aided the defendants in effectuating their price fixing activities as hereinabove described.

Effect of Conspiracy

18. The purpose, intent and effect of such combination and conspiracy and each of the acts of the defendants were and have been to fix the prices, terms and conditions of sale of beer in interstate trade and commerce in the Pacific Coast Area and

to prevent breweries located in States outside of the Pacific Coast Area from selling and distributing beer in interstate trade and commerce in said Pacific Coast Area except in compliance with terms and conditions agreed upon, fixed and determined by the defendants as aforesaid and interstate trade and [18] commerce in beer among the several States was thereby intentionally and unlawfully restrained.

Jurisdiction and Venue

19. The combination and conspiracy herein described has operated and has been carried out in part in the Western District of Washington, Northern Division, and within the jurisdiction of this court. In pursuance of said combination and conspiracy defendants in said District and Division held numerous meetings at which the practices and policies described in Paragraph 17 hereof were discussed and formulated and from time to time agreed upon by the defendants; from time to time defendants also conferred with one another and communicated with one another orally and in writing within said District and Division during the course of which the prices and price policies of the defendants were discussed, determined upon and made uniform and plans and methods of procedure adopted for continued concerted action designed to aid in stabilizing and maintaining said uniform prices and price levels; and within said District and Division the defendants have performed the acts and carried on the activities referred to in Paragraph 17 of this indictment.

And so the grand jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants, throughout the period aforesaid, at the places and in the manner and form aforesaid, wilfully and unlawfully have engaged in a continuing combination and conspiracy in restraint of trade and commerce in beer among the several States of the United States of America, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

COUNT TWO

And the grand jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do hereby reaffirm, reallege, and incorporate herein by reference, as if herein set forth in full, each of the allegations set forth in Paragraphs 1 to 14 inclusive of Count One of this [19] indictment.

Nature and Extent of Trade and Commerce Involved

20. Substantially all of the beer consumed in the Territory of Alaska is manufactured and supplied by breweries located in various States of the United States and is shipped by said breweries in trade and commerce between said States and the Territory of Alaska. Defendant breweries manufacture beer at their plants located within the Pacific Coast Area and from their stocks of beer so manufactured sell and ship substantial quantities thereof in trade and commerce to wholesalers, distributors, import-

ers and retailers of beer in the Territory of Alaska. Defendant breweries supply in excess of 75% of all beer sold, distributed and consumed in the Territory of Alaska.

The Conspiracy

21. Beginning on or about the first day of January, 1935, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of presentation of this indictment, the defendants herein, occupying a dominant and controlling position in the sale and distribution of beer in trade and commerce between the States of said Pacific Coast Area and the Territory of Alaska as aforesaid, together with other persons to the grand jurors unknown, well knowing all of the foregoing facts, have wilfully and unlawfully formed and engaged in a wrongful and unlawful combination and conspiracy to raise, fix, stabilize and maintain uniform, artificial and non-competitive prices for beer sold and shipped in trade and commerce between states of the said Pacific Coast Area and the Territory of Alaska, and as a part of said conspiracy, and in pursuance thereof, said defendants have arbitrarily, wilfully and unlawfully raised, fixed, stabilized and maintained uniform, artificial, and non-competitive prices in the sale of beer in trade and commerce between the states of said Pacific Coast Area and the Territory of Alaska, which combination and conspiracy has been and is now in restraint of trade and commerce between the several states of the United States and

the Territory of Alaska in violation of Section 3 of the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and [20] Commerce Against Unlawful Restraints and Monopolies" (26 Stat. 209), commonly known as the Sherman Act, said combination and conspiracy being now described in further detail, that is to say:

Means Used to Effectuate Conspiracy

22. As a part of said unlawful combination and conspiracy in restraint of trade and commerce as aforesaid and to effectuate the purposes thereof, the defendants agreed upon and utilized by concerted action, divers means and methods, including among others the following:

(a) Defendant companies and defendant individuals caused to be organized and organized said defendant associations, to wit: The Washington Brewers Institute, California State Brewers Institute, Idaho Brewers Institute, Inc., and Brewers Institute of Oregon under the respective laws of Washington, California, Idaho and Oregon, and said associations were thereupon and continuously thereafter utilized for the accomplishment of the objectives and purposes herein set forth and described; said associations were supported and maintained by the defendant breweries by means of assessments and dues levied upon and paid by said defendants in proportion to their respective aggregate sales in each of said States in said Pacific Coast Area.

(b) Defendants agreed upon, fixed, and determined uniform, artificial and non-competitive prices to be charged for beer and price levels to be stabilized and maintained for beer sold and shipped in trade and commerce between the states of said Pacific Coast Area and the Territory of Alaska, as aforesaid, and pursuant to said combination and conspiracy said defendant breweries thereafter sold and distributed beer in said trade and commerce at said uniform, artificial and non-competitive prices and price levels so fixed, determined and agreed upon as aforesaid.

(c) Defendants agreed upon and established uniform and non-competitive terms and conditions of sale of beer in trade and commerce between the states of said Pacific Coast Area and the Territory of Alaska and defendants included said uniform and non-competitive terms and conditions of sale in all contracts and agreements providing for the sale of beer in said trade and commerce, and said defendants required all purchasers of beer in the Territory of Alaska to adhere to said uniform and non-competitive terms and conditions of sale.

(d) Defendants agreed upon and established classifications of purchasers of beer and the prices to be charged each such classification in the sale of beer in trade and commerce between the states of said Pacific Coast Area

and the Territory of Alaska and defendant breweries adhered to said classifications and said prices in their sales of beer in said trade and commerce and required all wholesalers, distributors, importers and retailers in the Territory of Alaska to adhere to said classifications and said prices.

(e) Defendants agreed upon and used uniform types of bottles, containers and packages in the sale of beer in trade and commerce between the states of said Pacific Coast Area and the Territory of Alaska and further agreed upon uniform refunds and allowances for the return of empty bottles and containers; defendant breweries refused to grant refunds in amounts other than those which had been agreed upon and fixed, as aforesaid, and required all wholesalers, distributors, importers and retailers in the Territory of Alaska to sell beer in said Territory in such uniform types of bottles, containers and packages and refused to grant refunds for empty bottles and containers other than those so agreed upon and fixed by said defendants as aforesaid. [22]

(f) Defendants employed agents and investigators who, under defendants' instructions and on the defendants' behalf, closely supervised, checked and effectually policed the respective beer markets in cities, towns and trade areas in the Territory of Alaska for the purpose of securing adherence to the prices and price levels fixed by defendants as aforesaid.

(g) Defendants coerced wholesalers, distributors, importers and retailers in the Territory of Alaska to adhere strictly to the prices and price levels and the terms and conditions for the sale of beer agreed upon and fixed by defendants as aforesaid by threats that the sources of supply of beer of said wholesalers, distributors, importers and retailers would be cut off and their contracts and agreements for supplies of beer cancelled should they sell beer at prices below prices and price levels established by said defendants.

(h) Defendant breweries withheld and suspended shipment of beer to wholesalers, distributors, importers and retailers of beer in the Territory of Alaska who failed to adhere in their sales of beer to the prices and price levels agreed upon, fixed and determined by the defendants as aforesaid.

(i) Defendants attempted to induce and did induce breweries located in States of the United States outside of the Pacific Coast Area to sell beer in trade and commerce between said states located outside of the Pacific Coast Area and the Territory of Alaska at the prices and price levels arbitrarily fixed, determined and agreed upon by the defendants as aforesaid.

[23]

(j) Defendants attempted to induce and did induce breweries located in States of the United

States outside of the Pacific Coast Area to refrain from selling beer to wholesalers, distributors, importers and retailers located in the Territory of Alaska who had failed to adhere to the prices and price levels agreed upon, fixed and determined by the defendants as aforesaid.

(k) Defendant breweries from time to time sent to each other and to the defendant associations their price lists and prices for the sale of beer to the wholesalers, distributors, importers and retailers in the Territory of Alaska so that said price lists and prices could be made uniform and identical.

(l) Defendants have utilized said defendant associations as instrumentalities for the collection and exclusive dissemination among themselves of statistical data and information as to all phases of the beer industry in the Territory of Alaska and such information has materially aided the defendants in effectuating their price fixing activities as hereinabove described.

Effect of Conspiracy

23. The purpose, intent and effect of such combination and conspiracy and each of the acts of the defendants were and have been to fix the prices, terms and conditions of sale of beer in trade and commerce between the states of the Pacific Coast Area and the Territory of Alaska and between the States of the United States and the Territory of Alaska and to prevent breweries located in States of the United States outside of the Pacific Coast

Area from selling and shipping beer in trade and commerce to the Territory of Alaska except in compliance with terms and conditions agreed upon, fixed and determined by the defendants as aforesaid and trade and commerce in beer between [24] the several States of the United States and the Territory of Alaska was thereby intentionally and unlawfully restrained.

Jurisdiction and Venue

24. The combination and conspiracy herein described has operated and has been carried out in part in the Western District of Washington, Northern Division, and within the jurisdiction of this court. In pursuance of said combination and conspiracy defendants in said District and Division held numerous meetings at which the prices and policies described in Paragraph 22 hereof were discussed and formulated and from time to time agreed upon by the defendants; from time to time defendants also conferred with one another and communicated with one another orally and in writing within said District and Division during the course of which the prices and price policies of the defendants were discussed, determined upon and made uniform and plans and methods of procedure adopted for continued concerted action designed to aid in stabilizing and maintaining said uniform prices and price levels; and within said District and Division the defendants have performed the acts and carried on the activities referred to in Paragraph 22 of this indictment.

And so the grand jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants, throughout the period aforesaid, at the places and in the manner and form aforesaid, wilfully and unlawfully have engaged in a continuing combination and conspiracy in restraint of trade and commerce in beer between the several States of the United States of America and the Territory of Alaska, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America. [25]

A True Bill:

IRA J. DIEM

Foreman

THURMAN ARNOLD

Assistant Attorney General

TOM C. CLARK

Special Assistant to the Attorney General

J. CHARLES DENNIS

United States Attorney

CHARLES C. PEARCE

MANLEY B. STRAYER

Special Assistants to the Attorney General

LEONARD A. MARCUSSEN

ROBERT McFADDEN

Special Attorneys

[Endorsed]: A true bill. Ira J. Diem, Foreman.
J. Charles Dennis.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court in the presence of the Grand Jury, and Filed in the U. S. District Court May 5, 1941. Millard P. Thomas, Clerk. By Elmo Bell, Deputy. [26]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS
INSTITUTE, et al.,

Defendants.

DEMURRER OF DEFENDANTS WASHINGTON BREWERS INSTITUTE, HENRY T. IVERS, HERBERT J. DURAND, BOHEMIAN BREWERIES, INC., EDWIN F. THEIS, IDAHO BREWERS INSTITUTE, INC., STEVE T. COLLINS, PIONEER BREWING CO., INC., RUSSELL G. HALL, BECKER PRODUCTS COMPANY, GUS L. BECKER AND C. C. WILCOX.

Come now the defendants Washington Brewers

Institute, Henry T. Ivers, Herbert J. Durand, Bohemian Breweries, Inc., Edwin F. Theis, Idaho Brewers Institute, Inc., Steve T. Collins, Pioneer Brewing Co., Inc., Russell G. Hall, Becker Products Company, Gus L. Becker and C. C. Wilcox, not confessing to be true any matter or thing alleged or charged in the indictment as entered in the above entitled cause, and state that said indictment and the matters and things therein contained, in the manner and form as said matters and things are therein set forth, are not sufficient in law to require the above named defendants, or any of them, to plead to or answer the said indictment, and that said indictment, and each count thereof, is not sufficient in law to sustain a verdict or judgment against said defendants, or any of them; and this defendant demures to and moves to dismiss said indictment, and each count thereof, upon the following grounds:

FIRST COUNT

The first count of said indictment is insufficient in law in that:

A. Said indictment does not state facts sufficient to constitute an offense against the United States and does not state facts sufficient to show the commission of any offense against the United States, or in violation of any law of the United States by the defendants, or any of them.

B. Said indictment does not state facts sufficient to constitute an offense by the defendants, or any of them, under or in violation of Section 1 of the

Act of Congress, known as the Sherman Antitrust Act, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," as amended by the Act of August 17, 1937, entitled "an Act to Provide Additional Revenue for the District of Columbia and for Other Purposes" (Title 15, United States Code, Section 1).

C. It does not appear from said indictment that the matters therein charged and alleged to constitute the offense upon which said indictment is based (to-wit: violation of the Sherman Antitrust Act) are subject to, or within, the jurisdiction of this Court; and in that behalf it does not appear that any of the matters charged involved, with respect to trade or commerce among the several states,

- (a) any contract, combination, or conspiracy in restraint of any such trade; [66]
- (b) any monopoly or attempt to monopolize or conspiracy to monopolize any such trade; or
- (c) any effect upon such commerce, or any intent to affect the same.

D. It affirmatively appears in said indictment, and in each of the counts thereof, that the alleged wrongful and unlawful combination and conspiracy to raise, fix, stabilize and maintain uniform, artificial and non-competitive prices, and the alleged wrongful and unlawful acts of the defendants pursuant thereto, with which the defendants are charged, relate to trade and commerce in beer, which is defined in said indictment to be an alcoholic malt beverage, and is an intoxicating liquor within the mean-

ing of section 2 of the Twenty-First Amendment of the Constitution of the United States; that the Sherman Antitrust Act is not applicable to the alleged combination, conspiracy, and acts pursuant thereto, with which defendants are charged in said indictment, and said Sherman Antitrust Act is not enforceable against said defendants, or any of them; that the application and enforcement of said Sherman Antitrust Act against the defendants, or any of them, in this action would violate the rights of said defendants, and each of them, under the Fifth and Twenty-First Amendments to the Constitution of the United States, and would deprive them, and each of them, of liberty and property without due process of law.

E. Said indictment is vague, uncertain, and indefinite to an extent that the defendants, and each of them, are not advised thereby of the nature of the charges against them, or any of them, so that they may properly prepare and submit defenses thereto. No facts are stated sufficient to notify said defendants, or any of them, of the nature or cause of the accusations for which they are now sought to be placed on trial. Said indictment is vague, uncertain, and indefinite, as aforesaid, in the following particulars:

1. That it cannot be ascertained therefrom under subdivision (b), Paragraph 17, entitled: "Means Used to Effectuate Conspiracy," when, how, or in what manner defendants agreed upon, fixed, or determined prices to be charged in interstate trade. That it cannot be ascertained whether the acts

charged were in compliance with or done pursuant to the laws of the states from which or to which the beer is alleged to have been sold and distributed in interstate commerce.

2. That it cannot be ascertained from subdivision (c), Paragraph 17, how or in what manner defendants agreed upon or established uniform and non-competitive terms and conditions of sale, in what the alleged uniform and non-competitive terms and conditions of sale consisted, between whom such agreements were made, or what purchasers were required to adhere to said uniform and non-competitive terms and conditions of sale, or how such requirements were enforced. That it cannot be ascertained whether or not the acts charged by said subdivision (c) were in compliance with or done pursuant to the laws of the states from which or to which the beer is alleged to have been sold and distributed in interstate commerce, or in which same occurred.

[67]

3. That it cannot be ascertained upon what the classifications of purchasers referred to in subdivision (d) of said Paragraph 17 were based, whether all defendants agree upon the same classifications or same prices to be charged each classification, or how wholesalers, distributors, importers or retailers were required to adhere to such classifications or prices; or whether said wholesalers, distributors, importers and retailers were purchasers of beer intrastate or interstate; whether or not the acts charged by said subdivision (d) were in compliance with or done pursuant to the laws of the

states from which or to which the beer is alleged to have been sold and distributed in interstate commerce, or in which same occurred.

4. That it cannot be ascertained whether or not the acts alleged to have been done in subdivision (e) of said Paragraph 17 were intrastate or interstate, how the agreements were entered into, or with whom, or whether the practices therein referred to were in compliance with or done pursuant to the laws of the states from which or to which the beer is alleged to have been sold and distributed in interstate commerce or in which same occurred.

5. That it cannot be ascertained whether the acts charged in subdivision (f) of said Paragraph 17 were done by defendants, jointly or severally, intrastate or interstate. That it cannot be ascertained whether or not the fines and penalties referred to in said subdivision (f) were provided for by state laws, or whether defendants were authorized by the state laws to enforce or collect the same, or whether the offense charged is in not having paid the money collected to the states, or from whom said fines and penalties were collected, whether manufacturers, wholesalers, importers, or retailers.

6. That it cannot be ascertained whether the acts alleged to have been done under subdivision (g) of Paragraph 17 were done interstate or intrastate, by defendants jointly or severally, or whether the practices therein referred to were in compliance with or done pursuant to the laws of the states

from which or to which the beer may have been supplied, or in which the said acts occurred.

7. That it cannot be ascertained whether any of the acts referred to in subdivision (h) of Paragraph 17 were done interstate, or how the acts therein referred to affected interstate commerce, or whether said acts were in compliance with or done pursuant to the laws of the states in which same occurred.

8. That it cannot be ascertained from subdivision (i) of Paragraph 17 whether the laws of all of the states in the Pacific Coast area are uniform; whether it is claimed that defendants should not comply with the laws of the several states, whether the acts with which defendants are charged were done in compliance with or pursuant to said laws; whether defendants acted jointly in recommending and urging the adoption of said laws, or to whom the recommendations were made. That it further cannot be ascertained whether or not said respective laws were in force and effect during all the times referred to in said indictment, or during what portion of the time. [68]

9. That it cannot be ascertained from subdivision (j) of Paragraph 17 whether the meetings referred to were held between all the defendants, or where said meetings were held; whether the meetings or agreements had anything to do with interstate shipments, whether the postings and prices had reference to the defendants exclusively, or to other brewers; or whether the meetings and agree-

ments were in compliance with or pursuant to state laws.

10. That it cannot be ascertained from subdivision (k) of Paragraph 17 whether defendants located outside of any state sent price lists or price postings to the association existing in a state or states, other than that in which they manufactured and from which they shipped, how frequently or how often the practices referred to in said subdivision occurred, or whether all of the defendants engaged in said practice, whether the state laws prohibit such practice, or how it is known that said practices were not contemplated by the laws in force in said states, whether the prices were posted by the associations on behalf of defendants having their principal place of business in the particular states where posted, whether all of defendants posting prices in any particular zone or place posted through the association, for how many of defendants or what defendants the associations or what association posted prices which were in fact uniform and non-competitive.

11. That it cannot be ascertained from subdivision (l) of Paragraph 17 whether it is charged that defendants effectuated the conspiracy charged by selling beer at the prices and upon the terms and conditions of sale that had been posted.

12. That it cannot be ascertained from subdivision (m) of Paragraph 17 whether the acts therein charged were required by or in compliance with, or pursuant to state laws, or whether interstate sales are referred to by said subdivision.

13. That it cannot be ascertained from subdivision (n) Paragraph 17, how or by what means or method defendants attempted to induce breweries located in states outside the Pacific Coast area, as in said subdivision alleged, or whether defendants acted jointly in such efforts, or whether all price postings by defendants are referred to by said subdivision, or only price postings referred to in subdivision (k) of said Paragraph 17, or whether breweries located outside said area also posted prices in the states to which shipments were made.

14. That it cannot be ascertained from subdivision (o), Paragraph 17, how or by what means defendants attempted to induce breweries located outside of the states of the Pacific Coast area as in said subdivision alleged; whether such outside breweries posted prices, or whether what was done was in contemplation of and pursuant to state laws.

SECOND COUNT

The second count of said indictment is not sufficient in law in that: [69]

A. Said indictment does not state facts sufficient to constitute an offense against the United States and does not state facts sufficient to show the commission of any offense against the United States, or in violation of any law of the United States by the defendants, or any of them.

B. Said indictment does not state facts sufficient to constitute an offense by the defendants, or any of them, under or in violation of Section 3 or

the Act of Congress, known as the Sherman Anti-trust Act, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," as amended by the Act of August 17, 1937, entitled "An Act to Provide Additional Revenue for the District of Columbia and for Other Purposes" (Title 15, United States Code, Section 1).

C. It does not appear from said indictment that the matters therein charged and alleged to constitute the offense upon which said indictment is based (to wit: violation of the Sherman Antitrust Act) are subject to, or within, the jurisdiction of this Court; and in that behalf it does not appear that any of the matters charged involved, with respect to trade or commerce among the several states, or foreign nations.

(a) any contracts, combination, or conspiracy in restraint of any such trade;

(b) any monopoly or attempt to monopolize or conspiracy to monopolize any such trade; or

(c) any effect upon such commerce, or any intent to affect the same.

D. It affirmatively appears in said indictment, and in each of the counts thereof, that the alleged wrongful and unlawful combination and conspiracy to raise, fix, stabilize and maintain uniform, artificial and non-competitive prices, and the alleged wrongful and unlawful acts of the defendants pursuant thereto, with which the defendants are charged, relate to trade, and commerce in beer

which is defined in said indictment to be an alcoholic malt beverage, and is an intoxicating liquor within the meaning of section 2 of the Twenty-First Amendment to the Constitution of the United States; that the Sherman Antitrust Act is not applicable to the alleged combination, conspiracy, and acts pursuant thereto, with which defendants are charged in said indictment, and said Sherman Antitrust Act is not enforceable against said defendants, or any of them; that the application and enforcement of said Sherman Antitrust Act against the defendants, or any of them, in this action would violate the rights of said defendants, and each of them, under the Fifth and Twenty-First Amendments to the Constitution of the United States, and would deprive them, and each of them, of liberty and property without due process of law.

E. Said indictment is vague and indefinite as aforesaid, in the following particulars.

1. That it cannot be ascertained from subdivision (a) of Paragraph 22 whether it is claimed that all of defendants con- [70] tributed to all of the said associations in proportion to their respective aggregate sales in the state in which each said association is located.

2. That it cannot be ascertained from subdivision (b) of Paragraph 22 whether it is charged that prices for beer sold to Alaska were the same for beer shipped from all states in said Pacific Coast Area.

3. That it cannot be ascertained from subdivi-

sion (c) of Paragraph 22, between whom the contracts and agreements therein referred to were made, whether the terms and conditions referred to were terms and conditions of original sale, or terms and conditions of resale, or to what uniform and non-competitive terms and conditions of sale purchasers were required to adhere, or by what means they were required to adhere to same.

4. That it cannot be ascertained from subdivision (d), Paragraph 22, whether the classifications of purchasers were of purchasers from defendants, or of purchasers within the territory of Alaska of beer within the territory of Alaska.

5. That it cannot be ascertained from subdivision (e), Paragraph 22, whether or not the acts charged, or any thereof, were in compliance with or pursuant to the laws of the state or states from which the shipments were made, or the laws of the Territory of Alaska.

6. That it cannot be ascertained from subdivision (f), Paragraph 22, whether or not the acts charged, or any thereof, were in compliance with or pursuant to the laws of the state or states from which the shipments were made, or the laws of the Territory of Alaska.

6. (a) That it cannot be ascertained from subdivision (f), Paragraph 22, whether defendants jointly or severally employed agents and investigators as in said subdivision alleged.

7. That it cannot be ascertained from subdivision (g), Paragraph 22, whether it is charged that

all of defendants had contracts and agreements for supplies of beer to Alaska, or whether the threats alleged were made by defendants to those having contracts with them respectively, or whether defendants are charged with having threatened to cut off supplies or cancel contracts had with others than themselves respectively.

8. That it cannot be ascertained from subdivision (h), Paragraph 22, whether the prices in said subdivision referred to were resale prices, and if so, whether uniform resale prices are alleged to have been established by defendants for all beers manufactured and sold by defendants.

9. That it cannot be ascertained from subdivision (i), Paragraph 22, how or in what manner defendants attempted to induce or did induce breweries located in states outside of the Pacific Coast area to sell at prices alleged to have been fixed by defendants.

10. That subdivision (j), Paragraph 22, is uncertain, and it cannot be ascertained therefrom how or in what manner de- [71] fendants attempted to induce or did induce breweries outside of the Pacific Coast area, as in said subdivision referred to, or whether the price levels in said subdivision referred to were resale prices or between what character of buyers.

11. That subdivision (k) of Paragraph 22 is uncertain and that it cannot be ascertained therefrom whether all defendants sent price lists to all associations, or to the association in the state in which it was located.

Wherefore, these defendants pray that this demurrer be sustained; that the said indictment, and each count thereof, be dismissed as to these defendants and that these defendants be dismissed by the Court.

Dated this 19th day of June, 1941.

LENIHAN & IVERS

Attorneys for Defendants Washington Brewers Institute, Henry T. Ivers, Herbert J. Durand, Bohemian Breweries, Inc., Edwin F. Theis, Idaho Brewers Institute, Inc., Steve T. Collins, Pioneer Brewing Co., Inc., Russell G. Hall.

JAMES A. BROWN

Attorney for Defendants Bohemian Breweries, Inc., Edwin F. Theis.

C. STANLEY SKILES

Attorney for Defendants Idaho Brewers Institute, Inc., Steve T. Collins.

J. A. HOWELL

Attorney for Defendants Becker Products Co., Gus L. Becker, C. C. Wilcox.

Copy Received 6/21/41.

CHARLES C. PEARCE

Sp. Asst. to the Atty. Gen.

[Endorsed]: Filed Jun 21, 1941. [72]

[Title of District Court and Cause.]

ORDER OVERRULING DEMURRERS TO
INDICTMENT AND GRANTING MO-
TIONS FOR BILLS OF PARTICULARS
IN CERTAIN RESPECTS.

This matter having come on duly and regularly before the Honorable John C. Bowen, Judge of the above entitled Court; the defendants The Washington Brewers Institute, California State Brewers Institute, Idaho Brewers Institute, Inc., Brewers Institute of Oregon, Bohemian Breweries, Inc., Columbia Breweries, Inc., Golden Age Breweries, Inc., Interstate Brewery Company, Olympia Brewing Company, Pioneer Brewing Company, Seattle, Brewing & Malting Company, The Spokane Brewery, Inc., Aeme Breweries, Pacific Brewing & Malting Company, Regal Amber Brewing Company, Rainier Brewing Company, Golden West Brewing Company, San Francisco Brewing Corporation, Becker Products Company, East Idaho Brewing, Inc., Overland Beverage Company, Inc., Great Falls Breweries, Inc., Blitz-Weinhard Company, Salem Brewery Association, Henry T. Ivers, Herbert J. Durand, Peter G. Schmidt, Edwin F. Theis, William H. Mackie, Karl F. Schuster, Joseph E. Knapp, William P. Baker, Joseph Goldie, James G. Hamilton, Charles H. Lurmann, Steve T. Collins, Henry W. Wessinger, George W. Stackman, George F. Paulsen, Rene Besse,

Joseph F. Lanser, Harry R. Lawton, G. V. Uhr, Adolph D. Schmidt, Russell G. Hall, Emil G. Sick, George W. Allen, Arnold Wark, Morris Rosauer, Louis T. Bravos, Joseph M. Rothchild, Gus L. Becker, C. C. Wilcox, E. Louis Powell, Louis Mathias and Armand J. Ravetti having [74] been heretofore indicted and duly arraigned under said indictment and having entered their true names, and all the defendants having thereafter interposed separate demurrers to the indictment, and the defendants The Washington Brewers Institute, Idaho Brewers Institute, Inc., Brewers Institute of Oregon, Bohemian Breweries, Inc., Columbia Breweries, Inc., Golden Age Breweries, Inc., Interstate Brewery Company, Olympia Brewing Company, Pioneer Brewing Company, Seattle Brewing & Malting Company, The Spokane Brewery Inc., Acme Breweries, Regal Amber Brewing Company, Rainier Brewing Company, Becker Products Company, East Idaho Brewing, Inc., Overland Beverage Company, Inc., Great Falls Breweries, Inc., Blitz-Weinhard Company, Salem Brewery Association, Henry T. Ivers, Herbert J. Durand, Peter G. Schmidt, Edwin F. Theis, William H. Mackie, Karl F. Schuster, William P. Baker, Joseph Goldie, Steve T. Collins, Henry W. Wessinger, George W. Stackman, George F. Paulsen, Rene Besse, Joseph F. Lanser, Harry R. Lawton, G. V. Uhr, Adolph D. Schmidt, Russell G. Hall, Emil G. Sick, George W. Allen, Arnold Wark, Morris Rosauer, Louis T.

Bravos, Joseph M. Rothchild, Gus L. Becker, C. C. Wilcox, E. Louis Powell, Louis Mathias and Armand J. Ravetti having filed motions for bills of particulars, and the Court having on December 23, 1941 delivered its oral opinion in open Court overruling the demurrsers of the defendants and granting motions for bills of particulars in certain respects;

It Is Hereby Ordered, Adjudged and Decreed that the demurrsers and each of them in all respects be, and they are hereby overruled.

It Is Further Ordered, Adjudged and Decreed that the motions for bills of particulars separately filed herein are allowed in the following respects only:

With respect to subdivision (c) of Paragraph 17 of Count I of the indictment, the plaintiff is hereby ordered and required to set forth the nature of the uniform and non-competitive terms and conditions of the sale of beer therein [75] mentioned.

With respect to subdivision (d) of Paragraph 17 of Count I of the indictment, the plaintiff is hereby ordered and required to set forth the basis for the classifications therein mentioned.

With respect to subdivision (e) of Paragraph 17 of Count I of the indictment, the plaintiff is hereby ordered and required to set forth the characteristics of the uniform types of bottles therein referred to.

With respect to subdivision (c) of Paragraph 22

of Count II of the indictment, the plaintiff is hereby ordered and required to set forth the nature of the uniform and non-competitive terms and conditions of the sale of beer therein mentioned.

With respect to subdivision (d) of Paragraph 22 of Count II of the indictment, the plaintiff is hereby ordered and required to set forth the basis for the classifications therein mentioned.

With respect to subdivision (e) of Paragraph 22 of Count II of the indictment, the plaintiff is hereby ordered and required to set forth the characteristics of the uniform types of bottles therein referred to.

In all other respects the separate demands for bills of particulars are in each and every instance denied, without prejudice, however, to the right of defendants to renew said demands at a reasonable time before the trial of the case if it appears that the plaintiff is then in a better position to give further information, without disclosing the plaintiff's evidence, which is needed and material to the defense.

It Is Further Ordered, Adjudged and Decreed that exceptions to these rulings taken on behalf of all defendants and on behalf of plaintiff herein, and to each and every [76] ruling, be and the same are hereby allowed.

Done in open Court this 19th day of January, 1942.

JOHN C. BOWEN

United States District Judge.

Presented by:

ROBERT McFADDEN

Special Attorney

Department of Justice.

BOGLE, BOGLE and GATES

RAY DUMETT

Attys for Defts Columbia

Breweries, Inc.

[Endorsed]: Filed Jan. 19, 1942. [77]

In the District Court of the United States for
the Western District of Washington, Northern
Division.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF ACME
BREWERIES

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Acme Breweries, a corporation, being now regularly
before the Court for sentence, and being informed
by the Court of the charges herein, and the said
defendant Acme Breweries, a corporation, having

heretofore entered a plea of nolo contendere to Counts One and Two of the Indictment herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the Indictment herein, to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the Indictment herein, the said defendant, Acme Breweries, a corporation, pay a fine to the United States of America in the sum of \$1,000.00 with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant, Acme Breweries, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [117]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF GEORGE
W. ALLEN

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant,
George W. Allen, being now regularly before the
Court for sentence, and being informed by the Court
of the charges herein, and the said defendant,
George W. Allen, having heretofore entered a plea
of nolo contendere to Counts One and Two of the
indictment herein, which pleas are accepted by the
Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why pen-
alties should not be adjudged under the charges in
Counts One and Two of the indictment herein, to
which, said pleas of nolo contendere have been en-
tered,

Wherefore, by reason of the law and the premises,
it is

Considered, Ordered, and Adjudged that on Count
One of the indictment herein the said defendant,
George W. Allen, pay a fine to the United States
of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged
by the Court that on Count Two of the indictment
herein the said defendant, George W. Allen, pay a
fine to the United States of America in the sum of
\$1.00, without costs.

Done in Open Court this 26th day of October,
1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [118]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
WILLIAM P. BAKER

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
William P. Baker being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defendant
William P. Baker having heretofore entered a plea
of nolo contendere to Counts One and Two of the
indictment herein, which pleas are accepted by the
Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the indictment herein,
to which, said pleas of nolo contendere have been
entered,

Wherefore, by reason of the law and the premises,
it is

Considered, Ordered and Adjudged that on Count One of the indictment herein the said defendant William P. Baker pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant William P. Baker pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October,
1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [119]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
BECKER PRODUCTS CO.

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Becker Products Company a corporation, being
now regularly before the Court for sentence, and
being informed by the Court of the charges herein,
and the said defendant Becker Products Company,
a corporation, having heretofore entered a plea of
nolo contendere to Counts One and Two of the
Indictment herein, which pleas are accepted by the
Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the Indictment herein,

to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the Indictment herein, the said defendant Becker Products Company, a corporation, pay a fine to the United States of America in the sum of \$1000, with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant Becker Products Company, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [120]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
GUS L. BECKER

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Gus L. Becker being now regularly before the
Court for sentence, and being informed by the
Court of the charges herein, and the said defendant
Gus L. Becker having heretofore entered a plea of
nolo contendere to Counts One and Two of the
indictment herein, which pleas are accepted by the
Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the indictment herein,
to which, said pleas of nolo contendere have been
entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Gus L. Becker pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant Gus L. Becker pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [121]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
RENE BESSE

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Rene Besse being now regularly before the
Court for sentence, and being informed by the
Court of the charges herein, and the said defendant
Rene Besse having heretofore entered a plea
of nolo contendere to Counts One and Two of the
indictment herein, which pleas are accepted by the
Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defendant
being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the indictment herein,
to which, said pleas of nolo contendere have been
entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Rene Besse pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant Rene Besse pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [122]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
BREWERS INSTITUTE OF OREGON

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Brewers Institute of Oregon, a corporation,
being now regularly before the Court for sentence,
and being informed by the Court of the charges
herein, and the said defendant Brewers Institute
of Oregon, a corporation, having heretofore en-
tered a plea of nolo contendere to Counts One and
Two of the Indictment herein, which pleas are
accepted by the Court upon the consent of the
United States of America by Gareth M. Neville,
Special Attorney, Department of Justice, and there
having been no trial of any issue of fact herein,
and the said defendant being asked for legal cause
to show why penalties should not be adjudged under
the charges in Counts One and Two of the Indict-

ment herein, to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Brewers Institute of Oregon, a corporation, pay a fine to the United States of America in the sum of \$2,000.00, with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant Brewers Institute of Oregon, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [123]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
BOHEMIAN BREWERIES, INC.

This cause having come on regularly for hearing on this 26th day of October, 1942, and the defendant Bohemian Breweries, Inc., a corporation, being now regularly before the Court for sentence, and being informed by the Court of the charges herein, and the said defendant Bohemian Breweries, Inc., a corporation, having heretofore entered a plea of nolo contendere to Counts One and Two of the Indictment herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the Indictment herein,

to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Bohemian Breweries, a corporation, pay a fine to the United States of America in the sum of \$1500 with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant Bohemian Breweries, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [124]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF CALI-
FORNIA STATE BREWERS INSTITUTE

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
California State Brewers Institute, a corpora-
tion, being now regularly before the Court for sen-
tence, and being informed by the Court of the
charges herein, and the said defendant California
State Brewers Institute, a corporation, having here-
tofore entered a plea of nolo contendere to Counts
One and Two of the Indictment herein, which pleas
are accepted by the Court upon the consent of the
United States of America by Gareth M. Neville,
Special Attorney, Department of Justice, and there
having been no trial of any issue of fact herein,
and the said defendant being asked for legal cause
to show why penalties should not be adjudged under
the charges in Counts One and Two of the Indict-

ment herein, to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant California State Brewers Institute, a corporation, pay a fine to the United States of America in the sum of \$2,000, with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant California State Brewers Institute, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [125]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
STEVE T. COLLINS

This cause having come on regularly for hearing on this 26th day of October, 1942, and the defendant Steve T. Collins being now regularly before the Court for sentence, and being informed by the Court of the charges herein, and the said defendant Steve T. Collins having heretofore entered a plea of nolo contendere to counts One and Two of the indictment herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the indictment herein,

to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Steve T. Collins pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant Steve T. Collins pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [126]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
COLUMBIA BREWERIES, INC.

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Columbia Breweries, Inc., a corporation, being
now regularly before the Court for sentence, and
being informed by the Court of the charges herein,
and the said defendant Columbia Breweries, Inc.,
a corporation, having heretofore entered a plea of
nolo contendere to Counts One and Two of the Indictment
herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the Indictment herein, to which said pleas of nolo contendere have been entered.

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the Indictment herein, the said defendant, Columbia Breweries, Inc., a corporation, pay a fine to the United States of America in the sum of \$1000, with costs.

It is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant Columbia Breweries, Inc., a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [127]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
HERBERT J. DURAND

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Herbert J. Durand being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defendant
Herbert J. Durand having heretofore entered a plea
of nolo contendere to counts One and Two of the
indictment herein, which pleas are accepted by the
Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the indictment herein, to
which, said pleas of nolo contendere have been en-
tered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Herbert J. Durand pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant Herbert J. Durand pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [128]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
EAST IDAHO BREWING, INC.

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
East Idaho Brewing, Inc., a corporation, being
now regularly before the Court for sentence, and
being informed by the Court of the charges herein,
and the said defendant East Idaho Brewing, Inc.,
a corporation, having heretofore entered a plea of
nolo contendere to Counts One and Two of the Indictment
herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the Indictment herein,

to which said pleas of nolo contendere have been entered.

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the Indictment herein, the said defendant East Idaho Brewing, Inc., a corporation, pay a fine to the United States of America in the sum of \$750, with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant East Idaho Brewing, Inc., a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [129]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
RUSSELL G. HALL

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Russell G. Hall being now regularly before the
Court for sentence, and being informed by the Court
of the charges herein, and the said defendant
Russell G. Hall having heretofore entered a plea of
nolo contendere to counts One and Two of the in-
dictment herein, which pleas are accepted by the
Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said de-
fendant being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the indictment herein,
to which, said pleas of nolo contendere have been
entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Russell G. Hall pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant Russell G. Hall pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct 26, 1942. [130]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
JAMES G. HAMILTON

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant James G. Hamilton being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defendant James G. Hamilton having heretofore entered
a plea of nolo contendere to Counts One and Two of
the indictment herein, which pleas are accepted by
the Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defendant being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the indictment herein,
to which, said pleas of nolo contendere have been
entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant James G. Hamilton pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant James G. Hamilton pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [131]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
IDAHO BREWERS INSTITUTE, INC.

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Idaho Brewers Institute, Inc., a corporation,
being now regularly before the Court for sentence,
and being informed by the Court of the charges
herein, and the said defendant Idaho Brewers Institute,
Inc., a corporation, having heretofore entered
a plea of nolo contendere to Counts One and
Two of the Indictment herein, which pleas are ac-
cepted by the Court upon the consent of the United
States of America by Gareth M. Neville, Special
Attorney, Department of Justice, and there having
been no trial of any issue of fact herein, and the
said defendant being asked for legal cause to show
why penalties should not be adjudged under the
charges in Counts One and Two of the Indictment

herein, to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the Indictment herein, the said defendant Idaho Brewers Institute, Inc., a corporation, pay a fine to the United States of America in the sum of \$1500 with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant Idaho Brewers Institute, Inc., a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [132]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
INTERSTATE BREWERY COMPANY

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Interstate Brewery Company, a corporation,
being now regularly before the Court for sentence,
and being informed by the Court of the charges
herein, and the said defendant Interstate Brewery
Company, a corporation, having heretofore entered
a plea of nolo contendere to Counts One and Two
of the Indictment herein, which pleas are accepted
by the Court upon the consent of the United States
of America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the Indictment herein,

to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the Indictment herein, the said defendant Interstate Brewery Company, a corporation, pay a fine to the United States of America in the sum of \$1000, with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant Interstate Brewery Company, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [133]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
HENRY T. IVERS

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defen-
dant, Henry T. Ivers, being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defen-
dant, Henry T. Ivers, having heretofore entered
a plea of nolo contendere to counts One and Two of
the indictment herein, which pleas are accepted by
the Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why pen-
alties should not be adjudged under the charges in
Counts One and Two of the indictment herein, to

which, said pleas of nolo contendere have been entered.

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant, Henry T. Ivers, pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant, Henry T. Ivers, pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [134]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
JOSEPH E. KNAPP

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defen-
dant, Joseph E. Knapp, being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defen-
dant, Joseph E. Knapp, having heretofore entered a
plea of nolo contendere to Counts One and Two
of the indictment herein, which pleas are accepted
by the Court upon the consent of the United States
of America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said de-
fendant being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the indictment herein,

to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises,
it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant, James E. Knapp (named Joseph E. Knapp in the indictment), pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant, Joseph E. Knapp, pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October,
1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [135]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
JOSEPH F. LANSER

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defen-
dant, Joseph F. Lanser, being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defen-
dant, Joseph F. Lanser, having heretofore entered
a plea of nolo contendere to Counts One and Two
of the indictment herein, which pleas are accepted
by the Court upon the consent of the United States
of America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why pen-
alties should not be adjudged under the charges
in Counts One and Two of the indictment herein, to

which, said pleas of nolo contendere have been entered.

Wherefore, by reason of the law and the premises,
it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant, Joseph F. Lanser, pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant, Joseph F. Lanser, pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October,
1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [136]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
HARRY R. LAWTON

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defen-
dant, Harry R. Lawton, being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defen-
dant, Harry R. Lawton, having heretofore entered
a plea of nolo contendere to Counts One and Two
of the indictment herein, which pleas are accepted
by the Court upon the consent of the United States
of America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why pen-
alties should not be adjudged under the charges in
Counts One and Two of the indictment herein, to

which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant, Harry R. Lawton, pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant, Harry R. Lawton, pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [137]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
WILLIAM H. MACKIE

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defen-
dant, William H. Mackie, being now regularly be-
fore the Court for sentence, and being informed
by the Court of the charges herein, and the said de-
fendant, William H. Mackie, having heretofore en-
tered a plea of nolo contendere to Counts One and
Two of the indictment herein, which pleas are ac-
cepted by the Court upon the consent of the United
States of America by Gareth M. Neville, Special
Attorney, Department of Justice, and there having
been no trial of any issue of fact herein, and the
said defendant being asked for legal cause to show
why penalties should not be adjudged under the
charges in Counts One and Two of the indictment

herein, to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant, William H. Mackie, pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant, William H. Mackie, pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [138]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
OLYMPIA BREWING COMPANY

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defen-
dant, Olympia Brewing Company, a corporation,
being now regularly before the Court for sentence,
and being informed by the Court of the charges
herein, and the said defendant, Olympia Brewing
Company, a corporation, having heretofore entered
a plea of nolo contendere to Counts One and Two
of the Indictment herein, which pleas are accepted
by the Court upon the consent of the United States
of America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defen-
dant being asked for legal cause to show why pen-
alties should not be adjudged under the charges in
Counts One and Two of the Indictment herein, to

which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises,
it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant, Olympia Brewing Company, a corporation, pay a fine to the United States of America in the sum of \$1500, with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant, Olympia Brewing Company, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October,
1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [139]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
OVERLAND BEVERAGE COMPANY, INC.

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defen-
dant, Overland Beverage Company, Inc., a corpo-
ration, being now regularly before the Court for sen-
tence, and being informed by the Court of the
charges herein, and the said defendant Overland
Beverage Company, Inc., a corporation, having
heretofore entered a plea of nolo contendere to
Counts One and Two of the Indictment herein,
which pleas are accepted by the Court upon the
consent of the United States of America by Gareth
M. Neville, Special Attorney, Department of Jus-
tice, and there having been no trial of any issue of
fact herein, and the said defendant being asked
for legal cause to show why penalties should not
be adjudged under the charges in Counts One and

Two of the Indictment herein, to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant, Overland Beverage Company, Inc., a corporation, pay a fine to the United States of America in the sum of \$500.00 with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant, Overland Beverage Company, Inc., a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [140]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF PACIFIC
BREWING & MALTING COMPANY

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defen-
dant, Pacific Brewing & Malting Company, a cor-
poration, being now regularly before the Court for
sentence, and being informed by the Court of the
charges herein, and the said defendant, Pacific
Brewing & Malting Company, a corporation, having
heretofore entered a plea of nolo contendere to
Counts One and Two of the Indictment herein,
which pleas are accepted by the Court upon the
consent of the United States of America by Gareth
M. Neville, Special Attorney, Department of Jus-
tice, and there having been no trial of any issue of
fact herein, and the said defendant being asked for
legal cause to show why penalties should not be ad-
judged under the charges in Counts One and Two

of the Indictment herein, to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant, Pacific Brewing & Malting Company, a corporation, pay a fine to the United States of America in the sum of \$1000, with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant Pacific Brewing & Malting Company, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [141]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
GEORGE F. PAULSEN

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
George F. Paulsen being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defendant
George F. Paulsen having heretofore entered a plea
of nolo contendere to Counts One and Two of the
indictment herein, which pleas are accepted by the
Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney
the Attorney General, Department of Justice, and
there having been no trial of any issue of fact
herein, and the said defendant being asked for
legal cause to show why penalties should not be
adjudged under the charges in Counts One and

Two of the indictment herein, to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant George F. Paulsen pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant George F. Paulsen pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [142]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
PIONEER BREWING COMPANY

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Pioneer Brewing Company, a corporation, being
now regularly before the Court for sentence,
and being informed by the Court of the charges
herein, and the said defendant Pioneer Brewing
Company, a corporation, having heretofore entered
a plea of nolo contendere to Counts One and Two
of the Indictment herein, which pleas are accepted
by the Court upon the consent of the United States
of America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defendant
being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the Indictment herein,

to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the Indictment herein, the said defendant Pioneer Brewing Company, a corporation, pay a fine to the United States of America in the sum of \$750 with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant Pioneer Brewing Company, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [143]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
E. LOUIS POWELL

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
E. Louis Powell being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defendant
E. Louis Powell having heretofore entered a plea
of nolo contendere to Counts One and Two of the
indictment herein, which pleas are accepted by the
Court upon the consent of the United States of
America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defendant
being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the indictment herein,

to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant E. Louis Powell pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant E. Louis Powell pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [144]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
REGAL AMBER BREWING COMPANY

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Regal Amber Brewing Company, a corporation,
being now regularly before the Court for
sentence, and being informed by the Court of the
charges herein, and the said defendant Regal Am-
ber Brewing Company, a corporation, having here-
tofore entered a plea of nolo contendere to Counts
One and Two of the Indictment herein, which
pleas are accepted by the Court upon the consent
of the United States of America by Gareth M.
Neville, Special Attorney, Department of Justice,
and there having been no trial of any issue of fact
herein, and the said defendant being asked for
legal cause to show why penalties should not be
adjudged under the charges in Counts One and

Two of the Indictment herein, to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the Indictment herein, the said defendant Regal Amber Brewing Company, a corporation, pay a fine to the United States of America in the sum of \$1,000.00 with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant Regal Amber Brewing Company, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [145]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
ADOLPH D. SCHMIDT

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Adolph D. Schmidt being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defendant
Adolph D. Schmidt having heretofore entered
a plea of nolo contendere to Counts One and Two
of the indictment herein, which pleas are accepted
by the Court upon the consent of the United States
of America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been
no trial of any issue of fact herein, and the said
defendant being asked for legal cause to show
why penalties should not be adjudged under the
charges in Counts One and Two of the indict-

ment herein, to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Adolph D. Schmidt pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant Adolph D. Schmidt pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [146]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
PETER G. SCHMIDT

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Peter G. Schmidt being now regularly before
the Court for sentence, and being informed by the
Court of the charges herein, and the said defendant
Peter G. Schmidt having heretofore entered
a plea of nolo contendere to Counts One and Two
of the indictment herein, which pleas are accepted
by the Court upon the consent of the United States
of America by Gareth M. Neville, Special Attorney,
Department of Justice, and there having been no
trial of any issue of fact herein, and the said defendant
being asked for legal cause to show why
penalties should not be adjudged under the charges
in Counts One and Two of the indictment herein,

to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Peter G. Schmidt pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant Peter G. Schmidt pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [147]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

**JUDGMENT AND SENTENCE OF
KARL F. SCHUSTER**

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Karl F. Schuster being now regularly before
the Court for sentence, and being informed by
the Court of the charges herein, and the said defen-
dant Karl F. Schuster having heretofore en-
tered a plea of nolo contendere to Counts One and
Two of the indictment herein, which pleas are ac-
cepted by the Court upon the consent of the United
States of America by Gareth M. Neville, Special
Attorney, Department of Justice, and there having
been no trial of any issue of fact herein, and the
said defendant being asked for legal cause to show
why penalties should not be adjudged under the
charges in Counts One and Two of the indictment

herein, to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Karl F. Schuster pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the indictment herein the said defendant Karl F. Schuster pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [148]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
SEATTLE BREWING & MALTING COMPANY

This cause having come on regularly for hearing
on this 26th day of October, 1942, and the defendant
Seattle Brewing & Malting Company, a corporation,
being now regularly before the Court
for sentence, and being informed by the Court of
the charges herein, and the said defendant Seattle
Brewing & Malting Company, a corporation, having
heretofore entered a plea of nolo contendere to
Counts One and Two of the Indictment herein,
which pleas are accepted by the Court upon the
consent of the United States of America by Gareth
M. Neville, Special Attorney, Department of Justice,
and there having been no trial of any issue
of fact herein, and the said defendant being asked
for legal cause to show why penalties should not
be adjudged under the charges in Counts One and

Two of the Indictment herein, to which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the Indictment herein, the said defendant Seattle Brewing & Malting Company, a corporation, pay a fine to the United States of America in the sum of \$1500 with costs.

It Is Further Considered, Ordered, and Adjudged by the Court that on Count Two of the Indictment herein the said defendant Seattle Brewing & Malting Company, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [149]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
EMIL G. SICK

This cause having come on regularly for hearing on this 26th day of October, 1942, and the defendant Emil G. Sick being now regularly before the Court for sentence, and being informed by the Court of the charges herein, and the said defendant Emil G. Sick having heretofore entered a plea of nolo contendere to Counts One and Two of the indictment herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the

indictment herein, to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Emil G. Sick pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered and Adjudged by the Court that on Count Two of the indictment herein the said defendant Emil G. Sick pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [150]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
THE SPOKANE BREWERY, INC.

This cause having come on regularly for hearing on this 26th day of October, 1942, and the defendant The Spokane Brewery, Inc., a corporation, being now regularly before the Court for sentence, and being informed by the Court of the charges herein, and the said defendant The Spokane Brewery, Inc., a corporation, having heretofore entered a plea of nolo contendere to Counts One and Two of the Indictment herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the Indictment herein, to

which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant The Spokane Brewery, Inc., a corporation, pay a fine to the United States of America in the sum of \$1,000.00 with costs.

It Is Further Considered, Ordered and Adjudged by the Court that on Count Two of the indictment herein the said defendant The Spokane Brewery, Inc., a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942 [151]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
EDWIN F. THEIS

This cause having come on regularly for hearing on this 26th day of October, 1942, and the defendant Edwin F. Theis, being now regularly before the Court for sentence, and being informed by the Court of the charges herein, and the said defendant Edwin F. Theis having heretofore entered a plea of nolo contendere to Counts One and Two of the indictment herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the

indictment herein, to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant Edwin F. Theis pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered and Adjudged by the Court that on Count Two of the indictment herein the said defendant Edwin F. Theis pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [152]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
G. V. UHR

This cause having come on regularly for hearing on this 26th day of October, 1942, and the defendant G. V. Uhr being now regularly before the Court for sentence, and being informed by the Court of the charges herein, and the said defendant G. V. Uhr having heretofore entered a plea of nolo contendere to Counts One and Two of the indictment herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the

indictment herein, to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant G. V. Uhr pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered and Adjudged by the Court that on Count Two of the indictment herein the said defendant G. V. Uhr pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [153]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
THE WASHINGTON BREWERS INSTITUTE

This cause having come on regularly for hearing on this 26th day of October, 1942, and the defendant The Washington Brewers Institute, a corporation, being now regularly before the Court for sentence, and being informed by the Court of the charges herein, and the said defendant The Washington Brewers Institute, a corporation, having heretofore entered a plea of nolo contendere to Counts One and Two of the Indictment herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the Indictment herein, to

which said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant The Washington Brewers Institute, a corporation, pay a fine to the United States of America in the sum of \$2,000.00 with costs.

It Is Further Considered, Ordered and Adjudged by the Court that on Count Two of the indictment herein the said defendant The Washington Brewers Institute, a corporation, pay a fine to the United States of America in the sum of \$1.00.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [154]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 45509

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WASHINGTON BREWERS INSTITUTE,
et al,

Defendants.

JUDGMENT AND SENTENCE OF
C. C. WILCOX

This cause having come on regularly for hearing on this 26th day of October, 1942, and the defendant C. C. Wilcox being now regularly before the Court for sentence, and being informed by the Court of the charges herein, and the said defendant C. C. Wilcox having heretofore entered a plea of nolo contendere to Counts One and Two of the indictment herein, which pleas are accepted by the Court upon the consent of the United States of America by Gareth M. Neville, Special Attorney, Department of Justice, and there having been no trial of any issue of fact herein, and the said defendant being asked for legal cause to show why penalties should not be adjudged under the charges in Counts One and Two of the indictment herein, to which, said pleas of nolo contendere have been entered,

Wherefore, by reason of the law and the premises, it is

Considered, Ordered, and Adjudged that on Count One of the indictment herein the said defendant C. C. Wilcox pay a fine to the United States of America in the sum of \$250.00, without costs.

It Is Further Considered, Ordered and Adjudged by the Court that on Count Two of the indictment herein the said defendant C. C. Wilcox pay a fine to the United States of America in the sum of \$1.00, without costs.

Done in Open Court this 26th day of October, 1942.

JOHN C. BOWEN,
United States District Judge.

Presented by:

GARETH M. NEVILLE,
Special Attorney.

[Endorsed]: Filed Oct. 26, 1942. [155]

[Title of District Court and Cause.]

**STIPULATION WITH RESPECT TO
CLERK'S RECORD ON APPEAL**

Whereas, certain of the defendants herein have filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, which

said notice of appeal is based upon the failure of the District Court to sustain the demurrers filed by the several defendants, appellants herein; and

Whereas, the inclusion in the record of the Clerk of each of the demurrers filed by each of the separate defendants, appellants herein, would unnecessarily encumber the record and would serve no good purpose; Now, Therefore,

It Is Stipulated by the counsel for the plaintiff and the defendants, appellants herein, that each of said defendants have filed demurrers herein but that the Clerk of the District Court shall include in his record only the demurrer filed herein on behalf of the defendants, Washington Brewers Institute, et al.

Dated at Seattle, Washington, this 25th day of November, 1942.

ROBERT McFADDEN,
Special Assistant to the
Attorney General.

HENRY T. IVERS,
Attorney for Defendants-
Appellants.

[Endorsed]: Filed Nov. 25, 1942. [160]

[Title of District Court and Cause.]

STIPULATION RE CLERK'S RECORD ON APPEAL

Whereas, on the 25th day of November, 1942, a stipulation was entered herein with respect to the Clerk's record on appeal for the purpose of expediting the record and forwarding only one of the several demurrers filed; and

Whereas, it does not appear from such stipulation that the demurrers filed by the defendants not being included in the Clerk's record are upon the same grounds and raise the same questions as the demurrer which is being included; Now, Therefore,

It Is Hereby Stipulated that the demurrers filed by the defendants, appellants herein, which are not being forwarded as a part of the Clerk's record are upon the same grounds and raise the same questions as the demurrer on behalf of Washington Brewers Institute, et al, which is included in the Clerk's record.

Dated at Seattle, Washington, this 14th day of December, 1942.

CHARLES S. BURDELL,
Special Assistant to the
Attorney General.

HENRY T. IVERS,
Attorney for Defendants-
Appellants.

[Endorsed]: Filed Dec. 14, 1942. [160½]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America,
Western District of Washington—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 163, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said

District Court at Seattle, and that the same constitute the record on appeal herein from the judgments of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I transmit herewith as part of the record on appeal in this cause the original Assignment of Errors filed in this cause.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [164]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 393 folios at 15¢	\$ 58.95
and 49 folios at 05¢ (copies furnished).....	2.45
Appeal fees (16 Notices of Appeal at \$5.00 each)	80.00
Certificate of Clerk to Transcript of Record.....	.50
<hr/>	
Total.....	\$141.90

I hereby certify that the above amount has been paid to me by the attorneys for the appellants.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District this 17th day of December, 1942.

[Seal] JUDSON W. SHORETT,
Clerk of the United States District Court, Western District of Washington,
By TRUMAN EGGER,
Chief Deputy. [165]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the defendants, Seattle Brewing & Malting Company, a corporation, The Spokane Brewing & Malting Company, a corporation, Regal-Amber Brewing Company, a corporation, California State Brewers Institute, a corporation, Olympia Brewing Company, a corporation, The Brewers Institute of Oregon, a corporation, Interstate Brewing Company, a corporation, Overland Beverage Company, a corporation, Columbia Breweries, Inc., a corporation, East Idaho Brewing Company, Inc., a corporation, Becker Products Company, a corporation, Bohemian Breweries, Inc., a corporation, Idaho Brewers Institute, Inc., a corporation, Washington Brewers Institute, a corporation, Pioneer Brewing Company, a corporation, William H. Mackie, Rene Besse, Emil G. Sick, George W. Allen, James E. Knapp, William P. Baker, James G. Hamilton, Carl F. Schuster, Peter G. Schmidt, Adolph D. Schmidt, George F. Paulsen, G. V. Uhr, Joseph F. Lanser, Harry R. Lawton, E. Louis Powell, Gus L. Becker, C. C. Wilcox, Edwin F. Theis, Steve T. Collins, Henry T. Ivers, Herbert J. Durand and Russell G. Hall by the undersigned, their attorneys, and file and present to the court their assignment of errors herein whereby the above named defendants, as appellants, assign as error in the record and proceedings of the District Court

of the United States within and for the Western District, Northern Division [166] of the Judicial District of Washington in the above entitled cause the following particulars and errors, to-wit:

1. That the court erred in overruling the defendants' demurrers to the indictment duly and regularly filed herein and overruled by the court by its order entered herein on the 19th day of January, 1942, over the exceptions of the defendants at the time.

Dated at Seattle, Washington this 25th day of November, 1942.

LENIHAN & IVERS,
HENRY S. IVERS,
Attorneys for Defendants-
Appellants.

Copy received this 25th day of November.

ROBERT McFADDEN,
Special Attorney,
Dept. of Justice.

[Endorsed]: Filed Nov. 25, 1942. [167]

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Washington Brewers Institute, et al., Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United

States for the Western District of Washington,
Northern Division.

Filed December 21, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

In the District Court of the United States
for the Western District of Washington,
Northern Division

No. 45509

UNITED STATES OF AMERICA,
Plaintiff,
vs.

WASHINGTON BREWERS INSTITUTE, et al.,
Defendants.

NOTICE OF APPEAL OF DEFENDANT
BECKER PRODUCTS COMPANY

Becker Products Company, a corporation, 1900 Lincoln Avenue, Gus L. Becker, 2408 Van Buren Avenue, and C. C. Wilcox, 947 24th Street, all of Ogden, Utah, Appellants.

J. A. Howell, 625 Eccles Building, Ogden, Utah,
Attorney for Appellants.

Offense—Violation of Sections 1 and 3 of the

Act of Congress approved July 2, 1890 entitled "An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies" (26 Stat. 209).

Date of Judgment—October 26, 1942

Description of Judgment—Fine of \$1,001.00 against Becker Products Company, a corporation, fine of \$251.00 against Gus L. Becker and C. C. Wilcox.

We, the above named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

BECKER PRODUCTS
COMPANY
By G. L. BECKER
President
GUS L. BECKER
C. C. WILCOX
Appellants.

October 30, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy received Oct. 30th, 1942.

CHARLES S. BURDELL
Special Assistant to the
Attorney General

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 30, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 27, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANT
EAST IDAHO BREWING, INC.

East Idaho Brewing, Inc., a corporation, Pocatello, Idaho, Appellant.

Bogle, Bogle & Gates, Cassius E. Gates and Ray Dumett, 603 Central Building, Seattle, Washington, Attorneys for Appellant.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$751.00 plus costs against East Idaho Brewing, Inc., a corporation.

The above named appellant hereby appeals to the United States Circuit Court of Appeals for the

Ninth Circuit from the judgment above mentioned on the grounds set forth below.

EAST IDAHO BREWING, INC.
By LAURENCE M. PERRISH
Its President
Appellant.

October 26, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 31, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 27, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANT
COLUMBIA BREWERIES, INC.

Columbia Breweries, Inc., a corporation, 2120 South "C" Street, Tacoma, Washington, Appellant,

Bogle, Bogle & Gates, Cassius E. Gates and Ray Dumett, 603 Central Building, Seattle, Washington, Attorneys for Appellant.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$1,001.00 plus costs against Columbia Breweries, Inc., a corporation.

The above named appellant hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds sets forth below.

COLUMBIA BREWERIES, INC.
By NORMAN DAVIS
Its President
Appellant.

October 28th, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 31, 1942. Judson W. Shorett, Clerk.
By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 27, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS,
WASHINGTON BREWERS INSTITUTE,
HENRY T. IVERS AND H. J. DURAND.

Washington Brewers Institute, a corporation, 908 Hoge Building, Henry T. Ivers, 910 - 17th Avenue, North, and H. J. Durand, 1902 Bigelow Avenue, North, all of Seattle, Washington, Appellants.

Henry T. Ivers, 1405 Hoge Buiding, Seattle, Washington, Attorney for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$2001.00 plus costs against Washington Brewers Institute, a corporation, fine of \$251.00 each against Henry T. Ivers and H. J. Durand.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

[Seal] WASHINGTON BREWERS
 INSTITUTE

By H. J. DURAND, Secy.

.....

H. J. DURAND,
Appellants.

October 26, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy received 10/26/42.

GARETH M. NEVILLE

Special Attorney, Department
of Justice.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 26, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 27, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS,
COLUMBIA BREWERIES, INC., EAST
IDAHO BREWING CO., INC., JOSEPH F.
LANSER, HARRY P. LAWTON AND E.
LOUIS POWELL.

Columbia Breweries, Inc., a corporation, 2120 So. "C" Street, Tacoma, Washington, East Idaho Brewing Co., Inc., a corporation, Pocatello, Idaho, Joseph F. Lanser, Phoenix, Arizona, Harry P. Law-

ton, Flood Building, San Francisco, California, and E. Louis Powell, Pocatello, Idaho, Appellants,

Bogle, Bogle and Gates, Cassius E. Gates and Ray Dumett, 603 Central Building, Seattle, Washington, Attorneys for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$1,001.00 plus costs against Columbia Breweries, Inc., a corporation, fine of \$751.00 plus costs against East Idaho Brewing Co., Inc., a corporation, fine of \$251.00 against Joseph F. Lanser, fine of \$251.00 against Harry P. Lawton, fine of \$251.00 against E. Louis Powell.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

COLUMBIA BREWERIES,
INC.

By BOGLE, BOGLE & GATES,
CASSIUS E. GATES,
RAY DUMETT,
Their Attorneys of Record.
EAST IDAHO BREWING
CO., INC.

By BOGLE, BOGLE & GATES,
CASSIUS E. GATES,
RAY DUMETT,
Their Attorneys of Record
Appellants.

E. LOUIS POWELL
HARRY F. LAWTON
JOSEPH F. LANSER

By BOGLE, BOGLE & GATES,
CASSIUS E. GATES,
RAY DUMETT,
Their Attorneys of Record
Appellants.

October 26, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy received 10/26/42.

GARETH M. NEVILLE
Special Attorney, Department
of Justice

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 26, 1942. Judson W. Shorett, Clerk.
By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 27, 1942. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS
PACIFIC BREWERY & MALTING CO.,
AND JAMES E. KNAPP.

Pacific Brewing & Malting Co., a corporation, and James E. Knapp, 2808 Russ Building, San Francisco, California, Appellants,

Pillsbury, Madison & Sutro, 19th Floor, Standard Oil Building, San Francisco, California, Attorneys for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$1,001.00 plus costs against Pacific Brewing & Malting Co., a corporation, fine of \$251.00 against James E. Knapp.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

PACIFIC BREWING & MALT-
ING CO.

By J. E. KNAPP,
President
J. E. KNAPP,
Appellants.

October 30, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state

facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy received Oct. 30th, 1942.

CHARLES S. BURDELL,

Special Assistant to the Attorney General

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 30, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 27, 1942. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS
BOHEMIAN BREWERIES, INC., AND EDWIN F. THEIS.

Bohemian Breweries, Inc., a corporation, and Edwin F. Theis, 1402 W. Second Avenue, Spokane, Washington, Appellants,

James A. Brown, Paulsen Building, Spokane, Washington, and Henry T. Ivers, 1405 Hoge Building, Seattle, Washington, Attorneys for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$1,501.00 plus costs against Bohemian Breweries, Inc., a corporation, fine of \$251.00 against Edwin F. Theis.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

BOHEMIAN BREWERIES,
INC.

By EDWIN F. THEIS,
Pres.

EDWIN F. THEIS,
Appellants.

October 26, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy received 10/26/42.

GARETH M. NEVILLE
Special Attorney, Department
of Justice.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 26, 1942. Judson W. Shorett, Clerk.
By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 16, 1942. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS
CALIFORNIA STATE BREWERS INSTITUTE AND JAMES G. HAMILTON.

California State Brewers Institute, a corporation, and James G. Hamilton, 155 Montgomery Street, San Francisco, California, Appellants,

Brobeck, Phleger and Harrison, and Moses Lasky, 111 Sutter Street, and Emil Hoerschner, Phelan Building, San Francisco, California, Attorneys for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce Against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$2,001.00 plus costs against California State Brewers Institute, a corporation, fine of \$251.00 against James G. Hamilton.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

JAMES G. HAMILTON
[Seal] CALIFORNIA STATE BREWERS INSTITUTE
By JAMES G. HAMILTON
Secretary
Appellants.

October 26, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

BROBECK, PHLEGER & HAR-
RISON
MOSES LASKY
EMIL HOERSCHNER,
Attorneys for Above-named
Appellants

Copy received 10/26/42.

GARETH M. NEVILLE,
Special Attorney, Department
of Justice.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 26, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 11, 1942. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS
ACME BREWERIES AND KARL F.
SCHUSTER.

Aeme Breweries, a corporation, and Karl F. Schuster, 762 Fulton Street, San Francisco, California, Appellants,

Norman A. Eisner, Mills Building, San Francisco, California, Attorney for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$1,001.00 plus costs against Aeme Breweries, a corporation, fine of \$251.00 against Earl F. Schuster.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

ACME BREWERIES,
a corporation
By KARL F. SCHUSTER,
President
KARL F. SCHUSTER,
Appellants.

October 26, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

NORMAN A. EISNER

Attorney for above named
Appellants

Receipt of copy of the foregoing notice of appeal admitted this 26th day of October, 1942.

GARETH M. NEVILLE

Special Attorney, Department
of Justice.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 26, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 11, 1942. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS
REGAL-AMBER BREWING CO. AND
WILLIAM P. BAKER

Regal-Amber Brewing Co., a corporation, and William P. Baker, 675 Treat Street, San Francisco, California, Appellants.

R. M. J. Armstrong, 550 Montgomery Street, San Francisco, California, Attorney for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$1001.00 plus costs against Regal-Amber Brewing Co., a corporation, fine of \$251.00 against William P. Baker.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

REGAL - AMBER BREWING
CO.

By WM. P. BAKER,
President.

WM. P. BAKER,
Appellants.

October 26, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy Received 10/26/42.

GARETH M. NEVILLE,
Special Attorney, Dept. of
Justice.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, October 26, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed November 9, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS THE
BREWERS INSTITUTE OF OREGON,
GEORGE F. PAULSEN, INTERSTATE
BREWING CO., AND G. V. UHR

The Brewers Institute of Oregon, a corporation, and George F. Paulsen, Multnomah Hotel, Portland, Oregon, Interstate Brewing Co., a corporation, and G. V. Uhr, 215 W. Seventh St., Vancouver, Washington, Appellants.

John M. Pipes, 713 Yeon Building, Portland, Oregon, Attorney for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce Against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$2,001.00 against The Brewers Institute of Oregon, a corporation, fine of \$251.00 against George F. Paulsen, fine of \$1,001.00 against Interstate Brewing Co., a corporation, fine of \$251.00 against G. V. Uhr.

We, the above named appellants, hereby appeal to the United States Circuit Court of Appeals for

the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

[Seal] THE BREWERS INSTITUTE
 OF OREGON,
By GEORGE F. PAULSEN,
 Secretary.

GEORGE F. PAULSEN.

[Seal] INTERSTATE BREWING CO.,
By G. V. UHR,
 Secretary.
G. V. UHR,
 Appellants.

October 30, 1942.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy Received Oct. 30th, 1942.

CHARLES S. BURDELL,
Special Assistant to the At-
torney General.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 30, 1942. Judson W. Shorett, Clerk.
By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 16, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS
OLYMPIA BREWING COMPANY, PETER
G. SCHMIDT AND ADOLPH D. SCHMIDT

Olympia Brewing Company, a corporation, and Peter G. Schmidt and Adolph D. Schmidt, Tumwater, Washington, Appellants.

E. L. Skeel and Harry Henke, Jr., 914 Insurance Building, Seattle, Washington, Attorneys for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$1501.00 plus costs against Olympia Brewing Company, a corporation, fine of \$251.00 each against Peter G. Schmidt and Adolph D. Schmidt.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

OLYMPIA BREWING
COMPANY,
By PETER G. SCHMIDT,
President.
PETER G. SCHMIDT,
ADOLPH D. SCHMIDT,
Appellants.

October 26, 1942

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy Received 10/26/42.

GARETH M. NEVILLE,
Special Attorney, Dept. of
Justice.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 26, 1942. Judson W. Shorett, Clerk.
By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 16, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS SEATTLE BREWING & MALTING COMPANY, THE SPOKANE BREWERY, INC., WILLIAM H. MACKIE, RENE BESSE, EMIL G. SICK AND GEORGE W. ALLEN

Seattle Brewing & Malting Company, a corporation, 3100 Airport Way, Seattle, Wash., The Spokane Brewery, Inc., a corporation, 829 W. Broadway Ave., Spokane, Wash., William H. Mackie, 3100 Airport Way, Seattle, Wash., Rene Besse, Salem, Oregon, Emil G. Sick, 3100 Airport Way, Seattle, Wash., and George W. Allen, 3100 Airport Way, Seattle, Wash., Appellants.

Chadwick, Chadwick & Mills, 656 Central Bldg., Seattle, Washington, Attorneys for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$1501 against Seattle Brewing & Malting Company, a corporation, fine of \$1001 against The Spokane Brewery, Inc., a corporation, fine of \$251 against William H. Mackie, fine of \$251 against Rene Besse, fine of \$251 against Emil G. Sick, fine of \$251 against George W. Allen.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for

the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

SEATTLE BREWING &
MALTING COMPANY,
By STEPHEN L. CHADWICK,
THE SPOKANE BREWERY,
INC.,
By STEPHEN L. CHADWICK,
WILLIAM H. MACKIE,
RENE BESSE,
By STEPHEN L. CHADWICK,
EMIL G. SICK,
By STEPHEN L. CHADWICK,
GEORGE W. ALLEN,

October 26, 1942 Appellants.

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy received Oct. 26, 1942.

GARETH M. NEVILLE,
Special Attorney, Dept. of
Justice.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 26, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 16, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS PIONEER BREWING CO. AND RUSSELL G. HALL

Pioneer Brewing Co., a corporation, 4085 Lincoln Street, Aberdeen, Washington, and Russell G. Hall, 4085 Lincoln Street, Aberdeen, Washington, Appellants.

Lenihan & Ivers, 1405 Hoge Building, Seattle, Washington, Attorneys for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$751.00 plus costs against Pioneer Brewing Co., a corporation, fine of \$251.00 against Russell G. Hall.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

PIONEER BREWING CO.,
By R. G. HALL,
President.
R. G. HALL,
Appellants.

October 26, 1942

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy Received 10/26/42.

GARETH M. NEVILLE,
Special Attorney, Dept. of
Justice.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 26, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 27, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANT
OVERLAND BEVERAGE COMPANY

Overland Beverage Company, a corporation, Nampa, Idaho, Appellant.

Edwin Snow, Boise, Idaho, and Henry T. Ivers, 1405 Hoge Building, Seattle, Washington, Attorneys for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled "An

Act to Protect Trade and Commerce against unlawful Restraints and Monopolies" (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$501.00 plus costs against Overland Beverage Company, a corporation.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

OVERLAND BEVERAGE
COMPANY,
By HENRY T. IVERS,
Appellant.

October 26, 1942

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States.

Copy Received Oct. 29th, 1942.

CHARLES S. BURDELL,
Special Assistant to the Attorney General.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 29, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 27, 1942, Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANT
IDAHO BREWERS INSTITUTE

Idaho Brewers Institute, a corporation, and Steve T. Collins, Boise, Idaho, Appellants.

C. Stanley Skiles, Boise, Idaho, and Henry T. Ivers, 1405 Hoge Building, Seattle, Washington, Attorneys for Appellants.

Offense—Violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890 entitled “An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies” (26 Stat. 209).

Date of Judgment—October 26, 1942.

Description of Judgment—Fine of \$1501.00 plus costs against Idaho Brewers Institute, a corporation, fine of \$251.00 against Steve T. Collins.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

IDAHO BEWERS
INSTITUTE,
By STEVE T. COLLINS,
STEVE T. COLLINS
Appellants.

October 26, 1942

Grounds of Appeal—That the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the

United States, nor violation of any law of the United States.

Copy Received 10/26/42.

GARETH M. NEVILLE,
Special Attorney Dept. of
Justice.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 26, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: No. 10303. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 27, 1942, Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 10303

WASHINGTON BREWERS INSTITUTE, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Respondent.

STATEMENT OF POINTS (RULE 19-6)

For the purpose of complying with Rule 19 (6) of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the appellants hereby state that the points on which they intend to rely upon appeal and the portions of the record necessary for the consideration thereof are as follows:

1. That the demurrer to the indictment should have been sustained by the lower court and should be sustained by this court and the action, therefore, dismissed.

The portions of the record necessary for the consideration of this point are:

- (a) The indictment (Tr. 3);
- (b) Demurrer of defendants (Tr. 66);
- (c) Stipulation with respect to record on appeal (Tr. 160);
- (d) Stipulation with respect to record on appeal (Tr. 160-A);

(e) Order overruling demurrsers (Tr. 74).

Dated at Seattle, Washington, this 18th day of December, 1942.

LENIHAN & IVERS,
HENRY T. IVERS,
Attorneys for Appellants.

Copy Received December 18th, 1942.

CHARLES S. BURDELL,
Spec. Asst. to the Atty. Gen-
eral.

[Endorsed]: Filed Dec. 21, 1942.

No. 10,303

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit *✓*

WASHINGTON BREWERS INSTITUTE, REGAL
AMBER BREWING COMPANY, WILLIAM
P. BAKER, et al.,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Western District of Washington, Northern Division.

BRIEF FOR APPELLANTS,

REGAL AMBER BREWING COMPANY AND WILLIAM P. BAKER.

FILED

FEB - 4 1943

PAUL P. O'BRIEN,
CLERK

R. M. J. ARMSTRONG,
ALBERT L. CAMPODONICO,
550 Montgomery Street, San Francisco,
Attorneys for Appellants
Regal Amber Brewing Company
and William P. Baker.

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No. 10,303

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

WASHINGTON BREWERS INSTITUTE, REGAL
AMBER BREWING COMPANY, WILLIAM
P. BAKER, et al.,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Western District of Washington, Northern Division.

**BRIEF FOR APPELLANTS,
REGAL AMBER BREWING COMPANY AND WILLIAM P. BAKER.**

STATEMENT AS TO JURISDICTION.

On March 5, 1941, the grand jury of the United States of America, in and for the Northern Division of the Western District of Washington, presented to and filed in the United States District Court of said district an indictment charging appellants, Regal Amber Brewing Company and William P. Baker, among others, with violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against

Unlawful Restraints and Monopolies." (26 Stat. 209.) (Trans. p. 5.)

These appellants demurred to said indictment. (Trans. p. 38.) The demurrers, so interposed, were overruled by an order duly made, given and filed on January 19, 1942. On the 26th day of October, 1942, each of these appellants entered a plea of *nolo contendere* to both counts of said indictment and the Court on said last mentioned day entered its judgment fining defendant-appellant, Regal Amber Brewing Company, the sum of one thousand dollars (\$1000.00) on Count One and the sum of one dollar (\$1.00) on Count Two of said indictment. (Trans. p. 112.) Also on the same day, said Court entered its judgment fining defendant-appellant, William P. Baker, the sum of two hundred fifty dollars (\$250.00) on Count One and the sum of one dollar (\$1.00) on Count Two of said indictment. (Trans. p. 60.) Thereafter on said 26th day of October, 1942, the defendants, Regal Amber Brewing Company and William P. Baker, filed in the office of the Clerk of said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said judgments on the ground that the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States. (Trans. p. 156.)

STATEMENT OF CASE.

The defendants (appellants here) are charged in Count One of the indictment with having violated Section 1 of the Sherman Act. (26 Stat. (1890) 209, 15 U. S. C. A. §1.) The pertinent portions of that section read as follows:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”

They are charged in Count Two with having violated Section 3 of the Sherman Act, of which the pertinent portions read as follows:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.”

The violation of each section is by the terms thereof declared to be a misdemeanor.

Count One of the indictment alleges that the defendants have “wilfully and unlawfully formed and engaged in a wrongful and unlawful combination and conspiracy to raise, fix, stabilize and maintain, uniform, artificial and non-competitive prices for beer sold and distributed in the Pacific Coast Area in in-

terstate trade and commerce". (Paragraph 16 of Indictment, Trans. p. 18.) The Pacific Coast Area is defined in the indictment as "those territories comprised within the States of Washington, California, Idaho and Oregon". (Paragraph 8 of Indictment, Trans. p. 8.) Secondly, it is alleged that, as a part of said conspiracy and in pursuance thereof, said defendants "have arbitrarily, wilfully and unlawfully raised, fixed, stabilized and maintained uniform, artificial, and non-competitive prices in the sale of beer in interstate trade and commerce in the Pacific Coast Area as aforesaid." (Paragraph 16 of Indictment, Trans. p. 18.)

The gist of the conspiracy as alleged is one to fix prices for beer *sold and distributed* in the Pacific Coast Area and the various acts alleged have to do with the *sale and distribution* of beer in the Pacific Coast Area.

Similarly, the conspiracy alleged in Count Two of the indictment is one to fix, stabilize and maintain uniform, artificial and non-competitive prices for beer *sold and shipped* in trade and commerce between the states of the Pacific Coast Area and the Territory of Alaska (Paragraph 21 of Indictment, Trans. p. 30), and the various acts alleged have to do with the *sale and distribution* of beer in trade and commerce between states in the Pacific Coast Area and the Territory of Alaska.

These appellants interposed demurrers to said indictment; which demurrers were overruled.

I.

THE GENERAL CONTENTION OF THESE APPELLANTS.

The position of these appellants in interposing their demurrsers in the Court below should be defined before examining in detail the legal reasoning which supports the demurrsers. The contention of these appellants may be stated briefly.

Each of the states comprising the Pacific Coast Area and the Territory of Alaska has a complete and comprehensive set of special and general laws regulating the manufacture, use, sale, exportation and importation of beer within, from and into its borders,¹ and also has laws forbidding restraints of trade or commerce and the fixing or maintaining of artificial or non-competitive prices of commodities generally, but applicable to beer and other intoxicating liquors.²

¹The names of the liquor control acts and the citations thereof are as follows:

- (a) California Alcoholic Beverage Control Act, Calif. Gen. Laws No. 3796.
- (b) Idaho Liquor Act, Idaho Laws, 1939, page 465, C. 222, and page 584, C. 242, as amended in Idaho Laws, 1941, page 20, C. 10.
- (c) Oregon Liquor Control Act, Ore. Comp. Laws, §24-101 to §24-514.
- (d) Washington State Liquor Act, Rem. Rev. Stat. of Wash. §7306-1 to §7306-97a.
- (e) Alaska Liquor Control Act, Ses. Laws of Alaska, 1937, C. 78 (an express act of Congress, 48 U.S.C.A. §§292 and 293, gave the Alaska territorial legislature the power to regulate the sale of intoxicating liquors within the territory).

²The anti-trust laws involved are as follows:

- (a) *California*—Cartwright Anti-Trust Act, Calif. Gen. Laws, No. 8702, now Sections 16700 to 16758, Cal. Bus. & P. Code, prohibits illegal trusts and combinations; the Unfair Practices Act, Calif. Gen. Laws No. 8781 and the Fair Trade Act, Calif. Gen. Laws, No. 8782, now Sections 16900 to

A brief summary of the various liquor control laws of the Pacific Coast Area States and the Territory of Alaska will be found in the Appendix hereto.

This Court will take judicial notice of the existence of these various laws. (*Elwood v. Flannigan* (1882) 104 U. S. 562, 26 L. Ed. 842; and see 23 C. J. 127, footnote 71.)

The Sherman Act was passed in 1890 and is directed against the restraint of interstate or foreign trade,

16905 of Cal. Bus. & P. Code, prohibit sale of commodities below certain prices.

- (b) *Idaho*—Restrictions or combinations in restraint of trade and the anti-trust laws appear in Idaho Constitution Art. II, §18, and Idaho Code, §§17-4013, and 47-101 to 47-117.
- (c) *Oregon*—Specific restrictions are established in regard to particular acts, such as destroying competition in bidding for public contracts, substitution of trade-marked goods, preventing competitive bidding on livestock, and gasoline price fixing. There is an anti-price discrimination act (Ore. Comp. Laws, §§43-101 to 43-111), and a State fair trade act (Ore. Comp. Laws, §§43-401 to 43-405).
- (d) *Washington*—Monopolies, trusts and price-fixing agreements are forbidden by Article XII, Section 22 of the Washington Constitution. Non-profit corporations forfeit their charters for attempting to restrain trade (Rem. Rev. Stat. of Wash. §3898). Conspiracies in restraint of trade are punishable criminally (Rem. Rev. Stat. of Wash. §2382). The state also has a fair trade act (Rem. Rev. Stat. of Wash. §§5854-1 to 5853-36).
- (e) *Alaska*—The following provisions appear in Section 3271 of the Compiled Laws of Alaska:

“So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by Congress or the Legislature of Alaska, is adopted and declared to be law in the Territory.”

Combinations or agreements which tended to create a monopoly, unreasonably suppress competition, or restrain trade were illegal and void at common law and against public policy (41 C.J. 99 to 101). Consequently, the Territory of Alaska has an anti-trust law which follows simply the established common law rule, adopted by reference. This conclusion is supported by a statement appearing in Session Laws of Alaska, 1939, Chap. 13, at page 74.

that is, against restraining the business of buying and selling for gain whenever the transaction forms a part of commerce among the states or with foreign countries. (*U. S. v. Keystone Watch Case Co.* (1915) 218 Fed. 502, 515.) There must, however, be some direct and immediate effect upon interstate commerce in order to come within the Sherman Act. (*Hopkins v. U. S.* (1898) 171 U. S. 578, 43 L. Ed. 290.)

It is well settled, therefore, that if the subject matter of the alleged conspiracy, *does not relate to and act upon* interstate commerce, then it is *not* within the terms of the Sherman Act and is subject only to the laws of the state.

Hopkins v. United States (1898) 171 U. S. 578,
43 L. Ed. 290;

Anderson v. United States (1898) 171 U. S. 604,
43 L. Ed. 300;

Addyston Pipe & Steel Co. v. U. S. (1899) 175
U. S. 211, 44 L. Ed. 136;

U. S. v. E. C. Knight Co. (1895) 156 U. S. 1,
39 L. Ed. 325;

Industrial Assn. v. U. S. (1925) 268 U. S. 64,
69 L. Ed. 849.

In *Addyston Pipe & Steel Co. v. U. S.*, *supra*, the Court said (at p. 247):

“Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part

of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also governs and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state."

Where the sales and distributions are made after the goods have ceased to be a part of interstate commerce and constitute intrastate commerce, any conspiracy having for its object the creation of a monopoly in such commodity which is sold in intrastate commerce is subject only to the laws of the states affected thereby.

Waters-Pierce Oil Company v. Texas (1909)

212 U. S. 86, 99, 53 L. Ed. 417;

Standard Oil Co. v. State (1914) 107 Miss. 377,
65 So. 468;

State v. Racine Sattley Co. (1911) 63 Tex. Civ.
A. 663, 134 S. W. 400.

It is our contention that the conspiracy and acts charged in this indictment relate to the *sale and distribution of goods which must, as a matter of law, be treated like articles in intra-state commerce*, not like articles of interstate commerce; that by reason of the Twenty-first Amendment to the Constitution of the United States, and by reason of the laws of Congress, notably the Webb-Kenyon and Wilson Acts, herein-after cited and quoted, the subject-matter of the alleged conspiracy is subject to the laws of the respective states. The alleged conspiracy is to be tested as to its legality only by those state laws, since the al-

leged conspiracy does not act upon and embrace interstate commerce. In this respect the traffic in intoxicating liquors is distinct from trade and commerce in all other articles, because other articles have not been dealt with by the Constitution and by Congress in the same manner.

II.

HISTORICAL DEVELOPMENT OF THE STATUS OF INTOXICATING LIQUORS AS AN ARTICLE OF COMMERCE AMONG THE SEVERAL STATES.

For the purpose of greater clarity, we shall first present the historical development of the legal status of intoxicating liquors as respects:

- a. The character of intoxicating liquors as articles of interstate commerce;
- b. The powers of the National Government to regulate the transportation, importation and use of intoxicating liquors;
- c. The powers of the states to regulate the transportation, importation and use of intoxicating liquors.

Thereafter, we shall apply the legal conclusions which flow from that status to the question of the sufficiency of the indictment in the case at bar.

We necessarily commence with the granting by the Federal Constitution of the power to Congress "To regulate commerce with foreign nations, and among the several states" (U. S. Const., Art. I, sec. 8, clause

3), and with the proposition that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U. S. Const., Amendment X.)

A. From the adoption of the United States Constitution to the enactment of the Wilson Act, August 8, 1890.

In 1847, there arose what are commonly known as *The License Cases* (1847) 46 U. S. 504, 12 L. Ed. 256. Each of the cases arose upon a state law passed for the purpose of discouraging the use of liquors within the state by prohibiting their sale in small quantities without a license so to do from the state. The point was made that these state licensing statutes were bad because repugnant to the Commerce Clause of the Federal Constitution. The Court (at p. 577), speaking through Chief Justice Taney, declared that liquors were

"* * * admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists.

"And Congress, under its general power to regulate commerce with foreign nations, may prescribe what articles of merchandise shall be admitted, and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no state has a right to prohibit their introduction.

"* * * But although a State is bound to receive and to permit the sale by the importer of any

article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

In a further opinion in *The License Cases*, Mr. Justice McLean stated (at p. 590) :

"It is admitted that a State law which shall prohibit importations of foreign spirits, being repugnant to the commercial power in the federal government, and contrary to the Act of Congress on that subject, would be void. The object of such a law would, upon its face, be a regulation of commerce, which is not within the powers of a State. But a State has a right to regulate the sale of this, as of every other imported article, *out of the hands of the importer.*" (Italics ours.)

In 1889, just the year before the passage of the Sherman Act and the Wilson Act (26 Stat. (1890) 313, 27 U. S. C. A. §121), Mr. Chief Justice Fuller wrote the decision in *Leisy v. Hardin* (1889) 135 U. S. 100, 34 L. Ed. 128, declaring (at p. 125) that:

"Whatever our individual views may be as to the deleterious or dangerous qualities of particu-

lar articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character.”

The opinion in the *Leisy Case* stated also (at p. 109) that:

“Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free, and untrammeled. (Citing cases.)

“That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied.”

The decisions of the United States Supreme Court make it clear that during the period from 1788 to 1890 the status of liquors was as follows:

- a. Liquors had the character of and were articles of interstate commerce.
- b. The power to regulate liquors in interstate commerce resided solely in the National Government under the powers delegated to it by the Commerce Clause of the Constitution.
- c. The states had and could exercise their police powers to regulate liquors within their borders, but such power could not be exercised when such liquors had the character of articles in interstate commerce, which character continued while the liquors were in their original packages, in the hands of the importer.

B. From the enactment of the Wilson Act to the enactment of the Webb-Kenyon Act, March 1, 1913.

To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce, and there receive and sell the same in the original package in violation of state prohibitions, was the purpose which led to the enactment of the Wilson Act on August 8, 1890. (*James Clark Dist. Co. v. Western Md. R. Co.* (1916) 242 U. S. 311, 323, 61 L. Ed. 326.)

The Wilson Act was entitled "An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases." (Italics ours.) It provided that intoxicating liquors transported into any State or Territory or re-

maining therein for use, consumption, sale or storage therein,

“shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in like manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.” (26 Stat. (1890) 313, 27 U. S. C. A. §121.)

The Wilson Act was held to be constitutional in the case of *Re Rahrer* (1890), 140 U. S. 545, 35 L. Ed. 572. By this Act, Congress did not attempt to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States or to adopt State laws. Congress took its own course and made its own regulations, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. Congress did not use terms of permission to the State to act, but, according to the decision in the *Rahrer Case* (at p. 564),

“simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed but allowed imported property to fall at once upon arrival within the local jurisdiction.”

It provided that a certain subject of interstate commerce, intoxicating liquor, shall be governed by a rule

which divests it of its interstate character at an earlier period than would otherwise be the case (*Re Rahrer*, supra) that is, after delivery to the consignee and *before sale* in the original packages. (*Rosenberger v. Pacific Express Co.* (1916) 241 U. S. 48, 60 L. Ed. 880; *De Bary v. Louisiana* (1913) 227 U. S. 108, 57 L. Ed. 441.) By the Wilson Act Congress did not intend to confer upon the states the power to give their statutes an extraterritorial operation so as to subject persons and property beyond their borders to the restraints of their laws. (*Rhodes v. Iowa* (1898) 170 U. S. 412, 422, 42 L. Ed. 1088, 1095.)

The right to receive liquor was not affected by the Wilson Act (*James Clark Dist. Co. v. Western Md. R. Co.* (1916) 242 U. S. 311, 323, 61 L. Ed. 326.) But the Act placed intoxicating liquor coming within the state, after its arrival, "within the category of domestic articles of a similar nature". (*Re Rahrer* (1890) 140 U. S. 545, 35 L. Ed. 572.)

"The purpose of the Wilson Act was to make liquor after its arrival a domestic product and to confer power upon the states to deal with it accordingly. The police power is, hence, to be measured by the right of a state to control or regulate domestic products, a state and not a Federal, question as respects the commerce clause of the Constitution." (*Pabst Brewing Co. v. Crenshaw* (1905) 198 U. S. 17, 27, 49 L. Ed. 925.)

And since it is "expressly provided that intoxicating liquors coming into a state should be as completely under the control of a state as if the liquor had been manufactured therein" the state had the power to

forbid the soliciting within its borders of proposals to purchase intoxicating liquors even though such liquors were situated in other states. (*Delameter v. South Dakota* (1907) 205 U. S. 93, 99, 51 L. Ed. 724.)

During this period from 1890 to 1913 the status of liquor, as it is revealed by the leading decisions of that period, was as follows:

a. Liquors had the character of and were articles of interstate commerce, and upon their entry into a state they continued to retain their interstate character if they were for the personal use of the consignee, but if not for the personal use of the consignee, the protection under the commerce clause afforded such liquors as articles of interstate commerce was withdrawn by virtue of the Wilson Act, and, immediately upon arrival and delivery to the consignee, they became subject to the operation and effect of the laws of the state, enacted in the exercise of its police powers.

b. The National Government had the sole power to regulate liquors from the consignor in one state to the consignee in another state, but upon the delivery to the consignee (if not for his own use) such liquors became forthwith subject to regulation by the states.

c. The states had the full power to regulate liquors within their borders, notwithstanding such liquors were in the hands of the original consignee, if they were not for such consignee's own use.

C. From the enactment of the Webb-Kenyon Act to the Adoption of the Eighteenth Amendment, January 29, 1919.

The Webb-Kenyon Act (37 Stat. (1913) 699, 27 U. S. C. A. §122) became effective on March 1, 1913. The title of the Act was "*An Act divesting intoxicating liquors of their interstate character in certain cases.*" (Italics ours.)

It provides that the shipment or transportation of any intoxicating liquor from one state or territory to another, or from a foreign country, which is intended by any person interested therein to be received, possessed, sold or used in violation of any law of such state or territory, is prohibited. (27 U. S. C. A. §122.)

In 1914 the case of *Adams Express Co. v. Kentucky* (1914) 238 U. S. 190, 59 L. Ed. 1267, came before the United States Supreme Court on the question of the validity of a state statute making it unlawful for a public carrier to distribute liquors in any county where the *sale* had been prohibited. The effect of the Webb-Kenyon Act in its relation to the Wilson Act was carefully considered. The Court declared (at p. 198):

"* * * before the passage of the Webb-Kenyon Act, while the state, in the exercise of its police power, might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the state. The history of the Webb-Kenyon Act shows that Congress deemed this situation one requiring further legislation upon its

part, and thereupon undertook, in the passage of that act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the states by means of interstate commerce. That the act (the Webb-Kenyon Act) did not assume to deal with all interstate commerce shipments of intoxicating liquors into prohibitory territory in the states is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in certain cases. What such cases should be was left to the text of the act to develop."

The Court continued (at p. 199) :

"Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the state, to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

The Webb-Kenyon Act was considered further in *James Clark Distilling Co. v. Western Maryland R. Co.* (1916) 242 U. S. 311, 61 L. Ed. 326, in which the Court said (at p. 326) :

"* * * the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the Act of Congress ceased to apply."

The Court continued (at p. 330) :

“* * * the very regulation made by Congress, in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state, and selling it in violation of such law, was to devest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained.

“* * * the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other.”

The purpose of the Webb-Kenyon Act, according to the *Clark Distilling Case*, was:

“to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means of subterfuge and indirection to set such laws at naught.” (p. 324.)

The Act operated so as to cause the state law against shipment, receipt and possession to be applicable and controlling.

The Court said (at p. 325) :

“The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms devested by the Webb-Kenyon Act

of their interstate commerce character, * * * there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution."

The Webb-Kenyon Act surrendered and left to the states the power to regulate the traffic in intoxicating liquors "free from the Commerce Clause of the Constitution as theretofore interpreted by the Courts." (*Dugan v. Bridges* (1936) 16 Fed. Supp. 694, at p. 707; appeal dismissed, 300 U. S. 684, 81 L. Ed. 887.)

In *Seaboard Airline R. Co. v. North Carolina* (1917) 245 U. S. 298, 62 L. Ed. 299, the petitioner was convicted of violating the state law in failing to allow its books concerning interstate shipments of liquor to be examined, and contended that the Webb-Kenyon Act did not authorize the enforcement of the state regulation in view of the fact that an act of Congress prohibited such action on its part. The Supreme Court declared (at p. 304):

"The provisions of §15, Act to Regulate Commerce, here relied on, were intended to apply to matters within the exclusive control of the Federal Government; and when by a subsequent Act (the Webb-Kenyon Act) Congress rendered interstate shipments of intoxicating liquors subject to state legislation, those provisions necessarily ceased to be paramount in respect of them."

But the Webb-Kenyon Act was held to apply only to those things which the state law prohibited, and where receipt of liquor for personal use, not for resale, was not prohibited by the state law, then the

Webb-Kenyon Act did not apply, or change the rule that the states may not regulate commerce wholly interstate; and a shipment for personal use was consequently protected as interstate commerce. (*Adams Express Co. v. Kentucky* (1914) 238 U. S. 190, 59 L. Ed. 1267.)

The decisions of the highest Court of our country point out with precision that during the period from 1913 to 1919 the status of liquors was as follows:

- a. Liquors were divested of their interstate character by virtue of the effect of the Wilson Act and the Webb-Kenyon Act provided that the state had enacted appropriate legislation.
- b. The power to regulate liquors in interstate commerce resided solely in the National Government as long as such liquors retained their interstate character.
- c. The police power of the state to regulate traffic in liquors attached immediately when an interstate shipment of such liquors reached its state line and such state could by appropriate state law absolutely prohibit the entry of any such liquors into its borders; in other words, the law of the state was paramount with respect to such liquors.

D. From the effective date of the Eighteenth Amendment to the adoption of the Twenty-first Amendment, December 5, 1933.

The Eighteenth Amendment to the Constitution was adopted on January 29, 1919, and became effective one year thereafter. By that Amendment, "the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exporta-

tion thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes" was prohibited; and Congress and the several states were given "concurrent power to enforce this article by appropriate legislation".

Neither this Amendment nor the National Prohibition Act adopted pursuant thereto had the effect of repealing the Webb-Kenyon Act. (*McCormick & Co. v. Brown* (1932) 286 U. S. 131, 141, 76 L. Ed. 1017, 1024; *Ziffrin, Inc. v. Martin* (1938) 24 Fed. Supp. 924, 930, affirmed in 308 U. S. 509, 84 L. Ed. 435), or of repealing the Wilson Act. (*Premier Pabst Sales Co. v. McNutt* (1935) 17 Fed. Supp. 708.)

The Amendment added little to the power of the state to regulate intoxicating liquors imported from other states. As the Court said in *U. S. v. Lanza* (1922) 260 U. S. 377, 67 L. Ed. 314:

"Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, in vesting the national government with the power of country-wide prohibition, state power would be excluded. In effect, the 2d section of the 18th Amendment put an end to restrictions upon the state's power arising out of the Federal Constitution, and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the 1st section of the Amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down

or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the states, preserved to them by the 10th Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution." (p. 381.)

While prior to the adoption of the Eighteenth Amendment the only power possessed by the National Government with respect to the regulation of liquors was that derived from the commerce clause, the Amendment immediately vested the National Government with the power of intrastate regulation of liquors. As was stated in the *National Prohibition Cases* (1919) 253 U. S. 350, 64 L. Ed. 946,

"The power confided to Congress by that section (section 2 of the 18th Amendment) while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in nowise dependent on or affected by action or inaction on the part of the several states or any of them." (p. 387.)

What now is the status of liquors during this period from 1919 to 1933 as it appears from the decisions of the United States Supreme Court? The status is as follows:

a. Liquors have been entirely divested of their interstate character insofar as the regulation thereof by a state of their manufacture in, importation into, exportation from, or use therein is concerned, and

such regulation is free from any restraints of the commerce clause of the United States Constitution.

b. The power to prohibit liquors both intrastate and among the several states is vested in the National Government.

c. A state, in the exercise of its police power could enact laws prohibiting the manufacture in, importation into, exportation from, and use of liquors within its borders freed from any restraint by the Federal Constitution.

E. From the adoption of the Twenty-first Amendment to the presentation of indictment herein in May of 1941.

On December 5, 1933, the Twenty-first Amendment to the Constitution became effective.

By section 1 of the Amendment, the Eighteenth Amendment was repealed and all laws to the extent that their provisions rested upon that Amendment fell. The Wilson Act and the Webb-Kenyon Act were both passed prior to the adoption of the Eighteenth Amendment. They were enacted by the Congress pursuant to the power delegated to it by the commerce clause of the Constitution. And since these acts were consistent with the Eighteenth Amendment, they remained in effect during the whole of the period of the Eighteenth Amendment.

Had the Twenty-first Amendment simply repealed the Eighteenth Amendment, and nothing more, the respective positions and powers of the National Government and the States would have been exactly what they were prior to the adoption of the Eighteenth

Amendment. But the Twenty-first Amendment provided by Section 2 that "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof" was prohibited.

Prior to the adoption of the Eighteenth Amendment, the National Government had authority, by virtue of the commerce clause, to regulate liquors in interstate commerce in any manner it deemed to be best. However, as the Court said in *U. S. v. Chambers* (1933) 291 U. S. 217, 78 L. Ed. 763,

"the people are free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the Courts can assume the right to continue to exercise it." (p. 226.)

The Twenty-first Amendment, on its face, is a limitation on the power of the National Government in respect of the regulation of liquors in interstate commerce, enjoyed by the National Government under the commerce clause prior to the adoption of the Eighteenth Amendment. As has been shown, while formerly a state might not pass a law regulating liquors which, save as sanctioned by the Wilson Act or the Webb-Kenyon Act, in any way unduly burdened or interfered with interstate commerce, after the adoption of the Twenty-first Amendment, according to the decision in *Ziffrin Inc. v. Reeves* (1939) 308 U. S. 132, 84 L. Ed. 128, sanction was given to

"the right of a state to legislate concerning intoxicating liquors brought from without, un-

fettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.” (p. 138.)

As was further stated in *Premier-Pabst Sales Corp. v. Grosscup* (1935) 12 F. Supp. 970 (affirmed in 298 U. S. 266, 80 L. Ed. 1155), neither

“the Webb-Kenyon Act or the Twenty-first Amendment withdraws intoxicating liquor from the subjects of interstate commerce. Clearly neither does of itself because such liquors continue to be the subject of such commerce until the state has acted. As soon, however, as the importation is forbidden by a state law, the importation is forbidden by the Constitution and laws of the United States. In this respect, intoxicating liquor is made an exception to other subjects of interstate commerce.” (p. 973.)

Further, according to the *Grosscup* decision,

“if it (intoxicating liquor) cannot be imported without a violation of a law of the state, its importation is declared unlawful by the Webb-Kenyon Act and by the Twenty-first Amendment, and it is hence without the operation of the commerce clause.” (p. 973.)

Since the adoption of the Twenty-first Amendment in 1933, what has been and what is now the status of liquors as revealed by the decisions of the United

States Supreme Court and by decisions of the lower Courts that have been affirmed by the Supreme Court? The status is as follows:

- a. Wherever and whenever a state has exercised its police power and enacted thereunder laws for the regulation of intoxicating liquors, such liquors whether manufactured in the state or imported into the state are immediately withdrawn from the operation of the commerce clause and become clothed with all the incidents and characteristics of a domestic commodity and subject to all regulatory laws of the state free from and unfettered by any considerations arising out of the commerce clause of the United States Constitution or the equal protection clause of the Fourteenth Amendment to that Constitution.
- b. The power of the National Government to regulate the transportation, importation and use of liquors has been limited and qualified by the 21st Amendment.
- c. The power of a state to regulate the transportation, importation and use of liquors is absolute and unfettered by any provisions of the United States Constitution as to all liquors manufactured within the state or transported into the state for use within the state.

The foregoing historical summary, although lengthy, places us now in a position properly to analyze and determine the present situation with reference to regulation of commerce in intoxicating liquors.

III.

THE TWENTY-FIRST AMENDMENT HAS QUALIFIED AND LIMITED THE COMMERCE CLAUSE SO FAR AS INTOXICATING LIQUORS ARE CONCERNED, AND HAS REMOVED THEM FROM ITS OPERATION WHERE THE STATE HAS ADOPTED LAWS REGULATING THE IMPORTATION AND SALE OF SUCH INTOXICATING LIQUORS.

Section 2 of the Twenty-first Amendment provides:

“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

In its very first declaration upon the subject of the Twenty-first Amendment, the Supreme Court of the United States said in *U. S. v. Chambers*, supra, at pp. 225-6:

“Over the matter here in controversy, a power has not been granted but has been taken away. The creator of Congress has denied to it the authority it formerly possessed and this denial, being unqualified, necessarily defeats any legislative attempt to extend that authority.”

A three-judge Federal Court, in the decision in *Premier Pabst Sales Co. v. Grosscup* (1935) 12 Fed. Supp. 970, affirmed, 298 U. S. 266, 80 L. Ed. 1155, declared that

“* * * the measure of control which the states may exercise is determined by the States themselves. * * * Any state may, however, remove intoxicating liquor as a subject of interstate commerce. When it does so by passing a law on the subject of its importation, the law of the United

States forbids its further importation if in violation of the laws of the state. (pp. 971-972.)

"* * * such liquors continue to be the subject of such commerce until the state has acted." (p. 973.)

Another three-judge Federal Court declared that the power is "now returned to the states by the Twenty-first Amendment to regulate or forbid the importation of liquor".

Zukaitis v. Fitzgerald (1937) 18 Fed. Supp. 1000.

It was said in another case that the power of the states to control the traffic in liquor under the Twenty-first Amendment is "absolute" and that the power is not limited by the commerce clause of the Constitution.

Wylie v. State Board of Equalization (1937) 21 Fed. Supp. 604.

In still another decision by a three-judge Court, later affirmed by the Supreme Court, it was said that "So far as that one commodity is concerned, the nation again is in the same situation in which it was as to all commerce before the adoption of the Constitution."

Joseph S. Finch & Co. v. McKittrick (1938) 23 Fed. Supp. 244, affirmed in 305 U. S. 395, 83 L. Ed. 246.

Earlier rulings under the commerce clause are no longer applicable.

The decisions of the Supreme Court dealing with the Twenty-first Amendment as applicable to com-

merce in intoxicating liquors between states point clearly to the conclusion that by the Amendment the Constitution has withdrawn intoxicating liquors from the operation of the commerce clause in all cases where the states have adopted laws regulating the importation and sale of intoxicating liquors.

Before considering those decisions, we refer to certain principles which have been determined by the decisions under the commerce clause. First, the jurisdiction of Congress over commerce in intoxicating liquors, where it existed, was exclusive of state control over the subject. (*Leisy v. Hardin* (1889) 135 U. S. 100, 34 L. Ed. 128; *In re Rahrer* (1890) 140 U. S. 545, 35 L. Ed. 572; *Adams Express Co. v. Kentucky* (1914) 238 U. S. 190, 196, 59 L. Ed. 1267.) As the Supreme Court declared in the *Passenger Cases* (1849) 7 How. 283, 396, 12 L. Ed. 702, 749:

“A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution.”

Second, the commerce power of Congress, where it existed, excluded the police power of the state to deal with the importation and sale of commodities, whether Congress had legislated upon the subject or not (*Leisy v. Hardin* (1889) 135 U. S. 100, 109, 34 L. Ed. 128, 132.)

Third, the commerce clause conferred the right to import merchandise into any state free except as Congress might otherwise provide.

Fourth, the commerce clause prevented discrimination by the states in the exercise of their police power

against commodities imported from without the state, and the commerce clause was not to be "fettered" by legislation discriminating in favor of intrastate business. (*Best & Co. v. Maxwell* (1940) 311 U. S. 454, 85 L. Ed. 275.) It was to prevent such discrimination that the commerce clause was adopted. (*South Carolina etc. Dept. v. Barnwell Bros.* (1938) 303 U. S. 177, 187, 82 L. Ed. 734.)

The foregoing principles are inherent in the commerce clause and in the applicability thereof. We shall show that none of these principles are now applicable to intoxicating liquors by reason of the Twenty-first Amendment, and the commerce clause is not now applicable to intoxicating liquors where the state has undertaken to regulate the traffic in them.

In *State Board of Equalization v. Young's Market Co.* (1936) 299 U. S. 59, 81 L. Ed. 38, the Supreme Court was considering the California liquor control Act which imposed a license fee for importing beer, and which was attacked upon the ground that it violated the commerce clause and the equal protection clause of the Constitution. The Court there said:

"Prior to the Twenty-first Amendment, it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and *the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. The exaction of a fee for the privilege of importation would not, before the*

*Twenty-first Amendment, have been permissible even if the State had exacted an equal fee for the purpose of transporting domestic beer from its place of manufacture to the wholesaler's place of business. * * **

“The Amendment which ‘prohibited’ the ‘transportation or importation’ of intoxicating liquors into any state ‘in violation of the laws thereof,’ *abrogated the right to import free, so far as concerns intoxicating liquors.* The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.” (p. 62.)

“The plaintiffs argue that, despite the Amendments, a state may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer’s license fee was not imposed to that end. Surely the state may adopt a lesser degree of regulation than total prohibition. *Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?*” (Italics ours.) (p. 63.)

In *Mahoney v. Joseph Triner Corp.* (1938) 304 U. S. 401, 82 L. Ed. 1424 (reversing 11 Fed. Supp. 145 and 20 Fed. Supp 1019) the liquor control act of Minnesota was attacked upon the ground that it was discriminatory. The Court said (p. 403):

“The sole contention of Joseph Triner Corporation is that the statute violated the equal protection clause. The state officials insist that the provision of the statute is a reasonable regulation of the liquor traffic; and also, that *since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor. As we are of the opinion that the latter contention is sound, we shall not discuss whether the statutory provision is a reasonable regulation of the liquor traffic.*

“* * * The statute clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere. For only that locally processed may be sold regardless of whether the brand has been registered. *That, under the Amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was settled by State Board of Equalization v. Young's Market Co. * * **”
(Italics ours.)

In *Indianapolis Brewing Corp. v. Liquor Control Com.* (1939) 305 U. S. 391, 83 L. Ed. 243 (affirming 21 Fed. Supp. 969), the plaintiff sought to have the Michigan statute declared unconstitutional, upon the ground that it discriminated in treatment of beer imported from different states and violated the equal protection clause. The Court said (p. 394):

"Whether the Michigan law should not more properly be described as a protective measure, we have no occasion to consider. *For whatever its character, the law is valid. Since the Twenty-first Amendment, as held in the Young's Market Co. Case the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.* * * * The further claim that the law violates the due process clause is also unfounded. The substantive power of the state to prevent the sale of intoxicating liquor is undoubtedly." (Italics ours.)

In *Joseph S. Finch & Co. v. McKittrick* (1939) 305 U. S. 395, 83 L. Ed. 246 (affirming 23 F. Supp. 244), the Missouri law prohibited the sale of liquors manufactured in states which had laws discriminating against liquors manufactured in other states; and it was claimed that the law violated the commerce clause and equal protection clause. The Court said (p. 397):

"The claim of unconstitutionality is rested, in this Court, substantially on the contention that the statute violates the commerce clause. *It is urged that the Missouri law does not relate to protection of health, safety and morality, or the protection of the social welfare, but is merely an economic weapon of retaliation; and that, hence, the Twenty-first Amendment should not be interpreted as granting power to enact it.* Since that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. As was said in *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 62, 57 S. Ct. 77, 78, 81 L. Ed. 38, 'The words used are apt to confer upon the state the power to forbid all importations

which do not comply with the conditions which it prescribes.' *To limit the power of the states as urged 'would involve not a construction of the Amendment, but a rewriting of it.'*" (Italics ours.)

In *Ziffrin, Inc. v. Reeves* (1939) 308 U. S. 132, 84 L. Ed. 128 (affirming 24 Fed. Supp. 924), the Kentucky Control Act was attacked on the ground that it impaired plaintiff's rights under the Commerce Clause and deprived it of due process and equal protection under the Fourteenth Amendment. The Kentucky Act was a comprehensive measure designed rigidly to regulate the production and distribution of intoxicating liquors; "every phase of the traffic is declared illegal unless definitely allowed". The lower Court had rejected the appellant's contentions, including the one that intoxicating liquors were legitimate articles of commerce unless federal law had declared otherwise. The Supreme Court said (p. 138) :

"The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, *she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.* * * *

"Having power absolutely to prohibit manufacture, sale, transportation or possession of intoxicants, was it permissible for Kentucky to permit

*these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less * * * The state may protect her people against evil incident to intoxicants * * * and may exercise large discretion as to means employed.* (Italics ours.)

“* * * The statute declares whisky removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce.”

At page 140, referring to *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 63 and *Clason v. Indiana*, 306 U. S. 439, the Court said:

“The two cases last cited recognize that the State may decline to consider certain noxious things legitimate articles of commerce, and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband.”

It therefore clearly appears from the decisions of the Supreme Court of the United States that the Twenty-first Amendment is a limitation upon the power of the federal government under the Commerce Clause. Formerly the state could not adopt any law which burdened commerce between the states; under the Twenty-first Amendment the state can do so, so far as intoxicating liquors are concerned.

An unlimited power to regulate commerce in liquors is now vested exclusively in the states.

Since the Twenty-first Amendment, the right of a state to prohibit or regulate the importation of intox-

cating liquors is *not limited by the Commerce Clause*. That Amendment sanctions the right of the state to legislate concerning intoxicating liquors brought from without “unfettered by the Commerce Clause”. That Amendment has abrogated the right to import free, so far as concerns intoxicating liquors. The words used in the Amendment are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes. The state might even regulate the traffic by establishing a state monopoly of the manufacture and sale of beer or “channelize” importations by confining them to a single consignee. The state may now exercise “full police authority”.

The power which is now conferred upon the states by the Twenty-first Amendment to the Constitution can no longer exist in Congress. The exclusive power of Congress over commerce in intoxicating liquors has ceased to exist, and has been removed by the Amendment in all cases where the state has acted to regulate the traffic. There is no such anomaly under the Constitution as a concurrent power to regulate commerce. The power of Congress has, therefore, been excluded. On the other hand, the power of the state in the exercise of its police power over the subject has been described as “full police authority”. This power of the state has been made applicable to the subject by force of the Twenty-first Amendment. The police power is “complete, unqualified and conclusive”. (*The License Cases* (1847) 46 U. S. 504, 631, 12 L. Ed. 256.) Under the Twenty-first Amendment, the power of the state is not limited by the Commerce Clause.

That the full police power over intoxicating liquors has been vested in those states which have undertaken to regulate the traffic, free of constitutional limitations, clearly appears from those decisions which hold that by virtue of the Twenty-first Amendment the state may discriminate against imported liquors, unlimited by the commerce clause, and that the equal protection clause is not now applicable to the regulation by the state of the traffic in intoxicating liquors. The commerce clause, if applicable, would by its own force not be "fettered" by legislation discriminating against imports. It is now held, however, that the state may so discriminate "unfettered by the Commerce Clause".

The only conclusion which can follow from the decisions is that the commerce clause is not now applicable to importations of intoxicating liquors into those states where the state has adopted laws to regulate the traffic, but that intoxicating liquors in such cases are within the full police authority of the state and are not to be regarded as a proper article of interstate commerce.

Since the commerce clause is not applicable to the importation and sale of intoxicating liquors, under the Twenty-first Amendment, in cases where the state has acted to prohibit or regulate the importation of intoxicating liquors, as will be shown in the next two sections of this brief, the Sherman Act cannot be applicable in the case at bar, where all of the states in the Pacific Coast Area have adopted complete and comprehensive regulations for the importation and sale of intoxicating liquors and have also adopted laws against the restraint of trade and commerce.

IV.

UNDER THE WEBB-KENYON ACT IMPORTATION OF INTOXICATING LIQUORS HAS BEEN DIVESTED OF ITS INTERSTATE CHARACTER, UNDER FACTS ALLEGED IN THE INDICTMENT.

If intoxicating liquor cannot be imported into a state without a violation of the laws of the state, its importation is declared to be unlawful by the Webb-Kenyon Act, as well as by the Twenty-first Amendment, and hence is without the operation of the commerce clause. (*Premier Pabst Sales Co. v. Grosscup* (1935) 12 Fed. Supp. 970, affirmed in 298 U. S. 226, 80 L. Ed. 1155.)

Under the Webb-Kenyon Act, as we have heretofore shown, the movement of liquor in interstate commerce, as well as its receipt, possession and right to sell, if prohibited by the state law, is in express terms divested of its interstate character. (*James Clark Dist. Co. v. Western Maryland R. Co.* (1916) 242 U. S. 311, 325, 61 L. Ed. 326.) The very purpose of the Act, as shown by its title, was to divest intoxicating liquors of their interstate character in certain cases provided by the Act. (*Adams Express Co. v. Kentucky* (1914) 238 U. S. 190, 198, 59 L. Ed. 1267.)

The defendants in this case are charged with the importation and sale of liquor pursuant to a conspiracy to fix and maintain artificial and non-competitive prices in the sale and distribution thereof. Each of the states in question has adopted a complete set of special and general laws regulating the manufacture, use, sale, exportation and importation of beer, and also each of said states has laws forbidding re-

straints of trade or commerce or the fixing or maintaining of artificial or non-competitive prices of commodities, including within their scope intoxicating liquors.

If, therefore, the defendants have imported beer into the State of Washington, for instance, under the facts alleged in the indictment, it would constitute a violation of the Webb-Kenyon Act, which by its express terms divests the transaction of its interstate character, and makes the law of the state paramount in dealing with such importations and sale.

Such beer, therefore, under the Webb-Kenyon Act, would not be sold in or be a subject of interstate trade and commerce.

V.

UNDER THE WILSON ACT, THE ALLEGED CONSPIRACY RELATES ONLY TO A DOMESTIC ARTICLE SUBJECT ONLY TO THE POLICE POWER OF THE STATE.

The Wilson Act was enacted to limit the effect of the regulations of commerce among the several states. (See title of Act, 26 Stat. 313, 27 U. S. C. A., sec. 121.) That Act, like the Webb-Kenyon Act, was not repealed by the Eighteenth Amendment or the National Prohibition Act, but continued in force.

By virtue of that Act, intoxicating liquors transported into any state or territory, upon arrival and before sale, become subject to the operation and effect of the laws of that state or territory to the same extent and in the same manner as though such liquor had been produced in such state or territory. They

are thus placed "within the category of domestic articles of a similar nature" and the purpose of the Act is to make such liquor after its arrival "a domestic product and to confer power upon the states to deal with it accordingly" and the police power of the state is measured by the right of the state to control or regulate domestic products—a state and not a federal question as respects the commerce clause of the Constitution.

Under the Wilson Act, therefore, the subject matter of the alleged conspiracy, relating to the sale and distribution of beer, is an article which *necessarily becomes*, as a matter of law, a *domestic product*, and its sale and distribution is a matter of intrastate commerce, "*to the same extent and in like manner as though produced in such state or territory*".

There can be no question but that a conspiracy with reference to the sale and distribution of beer manufactured and sold in the State of Washington relates solely to intrastate commerce and is to be governed by the state laws, as was stated in *Gibbs v. McNeeley* (1901) 107 Fed. 210, where the Court said (at p. 212):

"The sale and the manufacture cannot be distinguished, so far as the question of state control is concerned; both take place within the state; both are equally within its police power; both affect interstate commerce in the secondary sense merely; neither affects it in the primary sense."

The alleged conspiracy being one relating to the sale and distribution of beer produced and sold in the state, it is not subject to the operation of the Sherman Act; it is intrastate commerce.

VI.

CONCLUSION.

The conspiracy alleged in Count One of the indictment was to commit an act, in respect to beer, within a state that had a complete system of laws regulating intoxicating liquors including beer. This being true, the conspiracy was to do an act in respect of a commodity while clothed with the characteristics of a domestic commodity of the state.

It is respectfully submitted that for the reasons above stated, Count One of the indictment does not charge a public offense or a crime under the Sherman Act.

Count Two of the indictment alleges a violation of section 3 of the Sherman Act. The violation of this section is alleged to have been accomplished by a conspiracy to raise, fix, stabilize and maintain uniform, artificial and non-competitive prices for beer *sold and shipped* in trade and commerce between states of said Pacific Coast Area and the Territory of Alaska and that the defendants in pursuance of the conspiracy did the things they conspired to do as respects "prices in the sale of beer in trade and commerce between the states of said Pacific Coast Area and the Territory of Alaska". (Paragraph 21 of Indictment.)

Here again this Court will take judicial notice of the fact that the Territory of Alaska has a complete set of laws regulating the manufacture, use and sale of beer within its borders, and, furthermore, has adopted the common law as respects restraints of trade and commerce.

This being true, such Territorial laws are paramount and exclusive of the laws of the National Government on the same subject. And the same argument and reasoning that applies respecting Count One applies to Count Two.

It is respectfully submitted that Count Two does not charge a public offense under section 3 of the Sherman Act.

Wherefore, these appellants respectfully submit that the judgment of the District Court be reversed; that the demurrs of these appellants to the indictment herein be sustained; that the charge against these appellants be dismissed and they and each of them be discharged.

Dated, San Francisco,
February 1, 1943.

Respectfully submitted,
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ALBERT L. CAMPODONICO,
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(Appendix Follows.)

Appendix.

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Appendix

THE WASHINGTON LIQUOR CONTROL ACT.

At an Extraordinary Session called for that purpose, in the year 1933, the legislature of the State of Washington adopted the Washington State Liquor Act (Rem. Rev. Stat., Sec. 7306-1, *et seq.*). That act provides for a system generally known as a "State Monopoly System" of liquor control. By that act all spirituous liquors are sold through a monopoly created and operated by the state itself. Wine and beer, with certain limitations, may be sold under restricted licensing conditions. By Sec. 79 the Washington State Liquor Control Board is given the broadest possible power to "make such regulations not inconsistent with the spirit of this act as are deemed necessary or advisable", which regulations, when promulgated as provided for, "thereupon shall have the same force and effect as though incorporated in this act". Because of this broad regulatory power we will hereafter refer to provisions of the act itself and regulations adopted thereunder indiscriminately.

Under Sec. 23 of the act various types of licenses and the fees to be charged therefor are described.

Sec. 23-F of the act provides that every manufacturer of malt liquor located outside the State of Washington, in order to sell his product to a wholesaler or beer importer licensed by the State of Washington, must obtain from the Washington State Liquor Control Board a certificate of approval, which can be obtained by meeting certain conditions set forth

therein and which may be revoked at the discretion of the Board.

Sec. 23-G provides for the licensing of beer importers and limits the importation of beer into the State of Washington or its transportation into the state to persons holding such license. It further prohibits the sale of such beer by an importer to any licensee or other person except licensed beer wholesalers.

Sec. 23-H makes it unlawful for any retail licensee to purchase beer from anyone other than a duly licensed beer wholesaler, and likewise restricts purchases of a brewer or a beer wholesaler to those made from a duly licensed wholesaler or importer.

Sec. 23-I prohibits canvassing, soliciting, receiving or taking orders for beer, and the contacting of any retail licensee in good will activities by any person other than an accredited representative of a person, firm or corporation holding a beer wholesaler's, brewer's or beer importer's license, and who, in addition, shall have individually procured an agent's license.

Sec. 27-D provides that every licensed brewer and beer importer shall be responsible for the conduct of any licensed beer wholesaler in selling or contracting to sell to retail licensees beer manufactured by such brewer or imported by such importer, and provides that the liquor control board may penalize the brewer or importer for violations of law committed by the wholesaler in the sale of the brands of beer manufactured by the brewer or imported by the importer,

irrespective of whether the brewer or importer actually participated in the violation.

Sec. 30 of the act prohibits brewers and wholesalers from giving liquor to any person, with limited exceptions.

Sec. 43 gives the board complete power to regulate advertising, and Sec. 44 describes the label which must appear on all packages of malt beverages.

Sec. 62 provides that "the action, order or decision of the board as to any permit or license shall be final and shall not be reviewed or restrained by injunction, prohibition or other process or proceeding in any court".

We have already referred to Sec. 79 and the general power of regulation which it confers on the board. Subparagraph "r" of Sec. 79 perhaps requires special mention, and it reads as follows:

"r. prescribing the conditions, accommodations and qualifications requisite for the obtaining of licenses to sell beer and wines, and regulating the sale of beer and wines thereunder."

Sec. 90 provides that no manufacturer or wholesaler or person financially interested directly or indirectly in such business shall have any financial interest, direct or indirect, in any licensed retail business nor own any property upon which retail business is conducted, nor advance money or moneys' worth to any retailer under any arrangement whatsoever, and prohibits any retailer from receiving any advance of money or moneys' worth. It further makes a manufac-

turer and wholesaler ineligible to receive or hold a retail license and prohibits a manufacturer or wholesaler from selling liquor at retail. It defines financial interest as any interest, whether through stock ownership, mortgage, lien, interlocking directors or otherwise.

Sec. 91 makes the violation of any provision of the act or regulations adopted pursuant to the act a violation of the act, whether specifically declared to be so or not.

The regulations of the board as heretofore published are consecutively numbered and codified under nine titles. Those to which we desire to draw particular attention are as follows:

Regulation 17 prohibits exclusive contracts between manufacturers, wholesalers and importers on the one hand and retail licensees on the other.

Regulation 18 prohibits manufacturers, wholesalers and importers from directly or indirectly soliciting, giving or offering to any retail licensee or employee any gifts, discounts, loans of money, premiums, rebates, free beer or wine, treats, or property or services of any nature whatsoever, and prohibits retail licensees from soliciting or receiving any of the foregoing. It also prohibits the furnishing, renting, lending or selling by a manufacturer, wholesaler or importer of any equipment, fixtures or supplies to any retailer, and prohibits any retailer from accepting the same.

Regulation 41 prohibits any retail licensee from buying or accepting delivery of beer except for cash paid at the time of or prior to delivery.

Regulation 44 prescribes the size of barrels and packages in which manufacturers, distributors or wholesalers shall sell their product.

Regulation 49 provides for the posting of prices according to zones as fixed and adopted by the board from time to time. It provides, that every licensed brewer and importer shall file price postings showing the wholesale prices at which all brands of beer manufactured or imported shall be sold in each zone, which prices shall be uniform for all retail licensees in any zone; that no beer wholesaler shall sell or offer to sell beer to any retailer at a price differing from that posted by the brewer manufacturing or the importer importing such beer; that no price posting shall become effective until ten (10) days after actual filing, and that no posting involving quantity discounts shall be made; that every brewer and importer shall file with the board a copy of every written contract or memorandum of every oral agreement between the brewer or importer and any beer wholesaler showing all terms of sale; that no licensed brewer or importer shall sell beer to any wholesaler unless such contract or memoranda are on file; that all price postings, contracts and memoranda shall be open to inspection and not considered confidential.

Regulation 50 provides the only method by which refunds can be made for spoiled beer.

Regulation 51-A provides that wholesalers, brewers and importers shall sell to retailers only for cash.

Regulations 52, 53, 54 and 55 provide that beer importers shall maintain a principal office, warehouses

for the storing of beer imported, shall keep on file with the board labels used on all beer imported, and shall not import or cause to be transported into the state any brand of beer unless such importer has filed with the board a notice of intention to import and has ascertained that the brewer manufacturing such beer is the holder of a certificate of approval.

Regulation 58 describes forms and reports to be made by holders of certificates of approval.

THE OREGON LIQUOR CONTROL ACT.

The Oregon Liquor Control Act, adopted at a Special Session of the Oregon Legislature (Laws of 1933 (2d S.S.) Chap. 17), is in all essential respects similar to the Washington Act. It also provides for a "State Monopoly System" of liquor control. Its provisions permit the sale of spirituous liquors only through a monopoly operated by the State itself. Wine and beer are permitted to be sold under restricted license conditions. A commission is created to operate the state monopoly and to regulate licensees.

Sec. 24-104 creates the commission, and Sec. 24-105, *et seq.*, defines its powers in general.

Subsec. (d) of Sec. 24-106, invests the commission with the power to control the manufacture, possession, sale, purchase, transportation, importation and delivery of alcoholic liquor, and Subsec. (h) empowers the commission to adopt regulations which shall have the full force and effect of law.

Sec. 24-118 provides for various types of licenses and the fees to be charged therefor.

Subsec. (b) of this section provides for a salesman's license and restricts the selling, soliciting or taking orders for alcoholic beverages to holders of such licenses, and makes it unlawful for such licensee to have any interest of any nature in the business or merchandise of any retail licensee.

Secs. 24-120 and 24-122 provide the grounds for refusing and canceling of licenses, and Subsec. 4 of each section provides as a ground that any applicant or licensee has been financed or furnished with money or property or received gratuities or rebates from any manufacturer or wholesaler.

Secs. 24-202 to 24-207 prohibit the manufacturer or wholesaler from having any interest in a retailer's premises, or furnishing any financial assistance, and prohibit a retailer from having any interest in the manufacturer or wholesaler, prohibit the furnishing of money, equipment or property or the giving of gratuities or rebates, and prohibit the acceptance of same by the retailer, providing for punishment of violations.

Regulation 9 of the Oregon Liquor Control Commission provides that all sales must be made for cash.

Regulation 10 provides for the posting of beer prices upon schedules which shall be uniform for the same class of trade buyers in the same trade area, and provides for the method of filing and changing filings and the time when such filings shall become effective, and providing for the closing out of brands under terms and conditions as set forth.

Subsec. (c) of the regulation provides for bad order claims and the conditions under which refunds may be made.

Subsec. (d) prohibits sales for future delivery and comprehensively prohibits the giving of any financial assistance.

THE CALIFORNIA ALCOHOLIC BEVERAGE CONTROL ACT.

The Alcoholic Beverage Control Act of California (Chap. 330, Laws of 1935), while not identical with either the Washington or Oregon law, contains, insofar as this present action is concerned, similar and, in some cases, identical provisions. The California act does not provide for the "State Monopoly System", but provides for the licensed sale of spirituous, vinous and malt liquors. The enforcement of the act is placed under the jurisdiction of the State Board of Equalization.

Sec. 5 of the act provides for the licensing of all persons engaged in the traffic, including importers.

Sec. 6 defines the privileges of licensees, including importers, who are privileged to import and export alcoholic beverages, and restricts wholesalers' licenses to persons doing a *bona fide* wholesale business, and prohibiting the sale by a wholesaler licensee to himself as a retail licensee.

Sec. 6.6 provides that no retail licensee may purchase from any person, except the holder of a manufacturer's or wholesaler's license.

Sec. 38e provides for the posting of prices by manufacturers, importers and wholesalers of beer, the period within which such prices so posted shall become effective, that prices so posted shall be strictly adhered to, and in general, contains provisions similar to the regulations in Oregon and Washington. This section also provides that "the Board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer", and provides for the dividing of customers into functional classes, and the establishing different prices for the same article for different functional classes, and provides that any trade association having as members licensed beer manufacturers representing more than half of the volume produced and sold in California may maintain an action to enjoin acts in violation of this section, and provides that the board may suspend or revoke licenses for three separate violations of this section committed within a period of one year.

Sec. 54 provides that no manufacturer, manufacturer's agent, importer or wholesaler, or any officer, director or agent thereof may hold any direct or indirect ownership of any interest in a retail license, or furnish, give or lend any money or other thing of value, or equipment, fixtures or supplies or decorations, paintings, signs, etc., to, or own any interest, directly or indirectly in the business, furniture or fixtures, or in the realty of any retail licensee, or deliver beverages on consignment, or give any free goods or secret rebates or commissions to any retailer, or any employee of such retailer, or directly or indi-

rectly hold any interest by any means in any firm or business furnishing, supplying or dealing in any office, store, restaurant, or other equipment.

Sec. 54.5 prohibits the holding by any on-sale retail licensee or any officer, director, employee or agent thereof, of any ownership or interest, directly or indirectly, in any manufacturer's, importer's or wholesaler's license.

Sec. 55.5 provides for contracts for the resale of trade marked or branded products at stipulated prices, and for the stipulation of resale prices for the sale of close out stocks after first offering such stocks to the manufacturer thereof.

Sec. 55.7 prohibits any licensee from directly or indirectly giving any premium, gift or free goods in connection with any sale of alcoholic beverages.

Sec. 55.8 provides that the board may adopt rules and regulations restricting credit.

Sec. 66 provides that only such alcoholic beverages as shall be in continuous transit through the state shall be exempt from the provisions of the act.

THE IDAHO LIQUOR ACT.

While the State of Idaho has what is known as a "State Monopoly System", whereby the sale of spirituous and vinous liquors is under the control of the Idaho Liquor Control Board and merchandising is solely through the state conducted monopoly, beer is manufactured and sold under a different act, plac-

ing the supervision in the Department of Law Enforcement. The Beer Control Act (Chap. 132, Laws of 1935) provides for the sale of beer under a licensing system therein provided.

Sec. 6 of the act provides for a certificate of approval as a condition precedent to the sale of any beer in Idaho manufactured outside of the state, and such certificate of approval may be revoked by the Commissioner of Law Enforcement; provides further that no wholesaler or dealer shall sell beer in the State of Idaho, except from stocks of merchandise in the State of Idaho, and also provides that schedules of prices shall be filed with the Commissioner, which shall be uniform for the same class of trade buyers in the same area, providing for the date upon which such filings shall become effective and the method of changing such filings, and providing that such filings shall be strictly adhered to.

This section further provides the size of packages and containers in which beer may be sold, and provides that no sale shall be made except for cash, and that no person shall sell or solicit or take orders for beer without having a permit issued by the Commissioner.

This section also provides that it is unlawful for any dealer, brewer or wholesaler, or person financially interested, directly or indirectly, therein to have any financial interest in any retail licensee's business or the property upon which the business is conducted, or to aid, directly or indirectly, such licensee by gifts, loans of money, property of any description, or services of any nature, or by giving premiums or rebates, and prohibits the furnishing, lending, renting or sell-

ing of any equipment, fixtures or supplies, and prohibits any contract to control the product or products handled by the retailer.

ALASKA LIQUOR CONTROL ACT.

Immediately after the ratification of the Twenty-First Amendment Alaska passed an Act regulating the sale of beer and wine, Chap. 71, Laws of 1933, and an act creating a Board of Liquor Control, Chap. 109, Laws of 1933. These enactments were specially ratified by Congress by Sec. 3 of the Repeal Act for Alaska, 48 Stat. 583.

By Section 2 of this latter act it is provided that the legislative power of the territorial assembly be extended to include the regulation of intoxicating liquor traffic and authorizes the legislature to delegate its authority to a Board or Commission with power to make rules and regulations.

Subsequently the Territorial legislature adopted a new Liquor Control Act, Chap. 78, Laws of 1937, which limits the sale of intoxicating liquors to and by licensees (except consumers), requires brewers and wholesalers whose plant or principal place of business is outside the territory to obtain a wholesaler's license, and to establish a principal place of business and designate a resident agent within the Territory, and provides for a malt beverage importer's license.

This Act also prohibits the ownership of any interest in a beverage dispensary or retail liquor store by a wholesaler or brewer and also prohibits direct or

indirect financing of, or supplying equipment or furnishings to, any retailer.

All of these laws have common characteristics, to which we especially desire to draw the Court's attention:

(1) In each case the State asserts complete and absolute control over the possession, sale, transportation, importation and exportation of intoxicating liquor during all of the time that such intoxicating liquor is within the geographical jurisdiction of the State. Legislative provision is made for every possible contingency so that no situation could arise where the law of the State would be inapplicable.

(2) Under the provisions of each law the traffic is limited to persons licensed by the State to engage therein, with complete definition of the rights and privileges under which such persons may so engage.

(3) Each act channelizes importations, subjecting them immediately upon arriving within the geographical jurisdiction of the State to all of the conditions and restrictions relating to the traffic.

(4) Two of the acts (Washington and Idaho) create a condition precedent to importation by providing for what is known as certificates of approval, which take effect prior to any attempted importation.

(5) Each of the acts controls the economic conduct of the trade and commerce and affirmatively restrains trade, making mandatory practices which in other pursuits have been declared to violate the Sherman Act.

No. 10,303

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

WASHINGTON BREWERS INSTITUTE, et al.,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

**OPENING BRIEF ON BEHALF OF
APPELLANTS, ACME BREWERIES AND KARL F. SCHUSTER.**

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Acme Breweries and Karl F. Schuster.

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**OPENING BRIEF ON BEHALF OF
APPELLANTS, ACME BREWERIES AND KARL F. SCHUSTER.**

HOW APPEAL COMES BEFORE THIS COURT.

An indictment was brought against numerous defendant breweries, associations and officers thereof charging violations of the Sherman Act. Demurrers were filed attacking the sufficiency of the indictment. The demurrers were overruled. The appellants pleaded *nolo contendere* and fines were imposed. Appeals were taken which present the question of the sufficiency of the indictment. This brief is written on behalf of appellants, Acme Breweries and Karl F. Schuster.

THE INDICTMENT.

The indictment charges a conspiracy under Section 1 of the Sherman Antitrust Act. The gravamen of the indictment is that defendants "have wilfully and unlawfully formed and engaged in a wrongful and unlawful combination and conspiracy to raise, fix, stabilize and maintain, uniform, artificial and non-competitive prices for beer sold and distributed in the Pacific Coast Area in interstate trade and commerce as aforesaid, and as a part of said conspiracy and in pursuance thereof, said defendants have arbitrarily, wilfully, and unlawfully raised, fixed, stabilized and maintained uniform, artificial and non-competitive prices in the sale of beer in interstate trade and commerce in the Pacific Coast Area, as aforesaid".

The indictment sets out the means and methods which the defendants agreed upon and utilized to effectuate the purpose and intent of the conspiracy. It affirmatively appears by the allegations that the states of the Pacific Coast Area have enacted laws, compliance with which has in large measure constituted the methods and means alleged to have been employed by the defendants.

Subdivision (i) of Section 16 reads as follows:

"Under the respective laws of the States of the Pacific Coast Area relating to the manufacture, sale, distribution and consumption of alcoholic liquors and alcoholic malt beverages, there was created in each of said States a control authority known as a liquor control board or commission or commissioner or administrator, said authority being charged by statute with the enforcement of

the provisions of said laws and empowered to make all necessary and proper rules and regulations in the administration thereof. Defendants agreed upon, recommended and urged the adoption and promulgation by the respective control authority in each State of said Pacific Coast Area of rules and regulations whereby each of said States was arbitrarily divided into geographical trade areas known as 'zones' and all brewers and importers of beer selling beer in said zones were required to file with said control authority in each of said States price lists which were designated and known as 'price postings' showing the prices at which beer manufactured by such brewers and imported by such beer importers should be sold in each of said zones; said rules and regulations prohibited the sale of beer at prices other than those so posted, and imposed penalties for failure to adhere to such posted prices; said rules and regulations further provided that prices posted in said States, as aforesaid, should not become effective until a certain period of time had elapsed after the filing thereof; and said rules and regulations further required all breweries and importers, desiring to engage in business in the sale of beer in said States in said Area, to file with respective control authority copies of all written contracts and memoranda of oral agreements, including all terms and conditions of sale, between breweries and wholesalers and between importers and breweries and wholesalers engaged in business in the sale of beer in said States; defendants recommended and urged the adoption of said zones and said price posting rules and regulations by the liquor control authority in each State as aforesaid so that said zoning and price posting systems could be utilized by the defendants to further and

effectuate their unlawful scheme and conspiracy to raise, fix, make uniform, and maintain arbitrary and non-competitive prices and terms and conditions of sale of beer in the Pacific Coast Area as aforesaid."

It affirmatively appears that each of the Pacific Coast Area states has a law governing the manufacture, sale, distribution and consumption of alcoholic liquors and alcoholic beverages, and that each law provides for the creation of a control board or commission or administrator for the enforcement of laws, and with authority to make all necessary and proper rules and regulations in the administration thereof. While the provisions of the laws themselves are not otherwise set forth, it is affirmatively alleged that the control authorities in each of said states have enacted rules and regulations which embrace substantially the means and methods alleged to have been employed by the defendants and which are alleged to have the effect of fixing and maintaining prices in interstate commerce. Defendants are charged with having agreed upon, recommended and urged the adoption and promulgation of the rules and regulations. In how far the rules and regulations followed the requirements of the statutes themselves, does not appear. They must, however, have come within the scope and general provisions of the statutes in order to be valid regulations and not unlawful attempts at legislation.

The indictment charges the defendants with a violation of Federal law by having committed acts, in whole or in part, required by state laws, and the existence of which state laws is affirmatively disclosed

on the face of the indictment. It affirmatively appears that the states have passed laws which require prices to be publicly announced and posted at least ten days in advance of the time they become effective; require public record of contracts of sale; require adherence to prices that have been posted; require licensing of both sellers and buyers; recognize the place of trade associations of manufacturers in the industry and provide that they shall act as enforcement agencies of the law. It is charged that defendants organized associations, the existence of which is contemplated by state laws; that prices were fixed and established by procedure required by state laws; the indictment charges that contracts were of uniform terms, and at the same time recites the existence of state laws both restricting the terms of all contracts and requiring that all contracts should be of public record; that defendants classified customers and required each class to adhere to classifications and prices, and yet that this was the very thing required by the state legislation; that defendants used uniform types of containers, and that this was, likewise, required by state regulations; that defendant associations collected fines for violations of regulations and that state laws provided the basis and right for such collection; that defendants sought to compel adherence to the prices established, and that this was the very thing that the state laws wanted accomplished.

The indictment charges that defendants influenced the making of the regulations under the statutes, but it is not recited that any improper means were used, nor does it appear that the regulations were other than

such as were contemplated by the statutes, nor that they were in any respect at variance with, contrary to or beyond the scope of the statutes themselves.

THE ISSUE.

The basis of jurisdiction is interstate commerce. The indictment alleges that interstate commerce is involved because beer in certain quantities has been shipped between the states. (Tr. p. 16.) It alleges nothing further. This would be a sufficient allegation as to any ordinary commodity, interstate shipment of which states have no power to bar, burden, restrain or regulate. Interstate shipment ordinarily constitutes interstate commerce, the regulation of which is vested in the Federal Government. It is the position of appellants that in view of the Twenty-first Amendment to the Constitution, the mere allegation that beer, an intoxicating liquor, has been shipped between states is an insufficient allegation of Federal jurisdiction. It is entirely consistent that shipments were made interstate and yet were outside the domain of interstate commerce. It is further the position of these appellants that, inasmuch as it affirmatively appears by the indictment that the states have enacted laws to regulate and control prices and methods of merchandising the commodity, compliance with which has resulted in the elimination of competition and uniformity of prices, the supremacy of the state laws nullifies what would otherwise constitute a violation of Federal laws.

These appellants rely upon the following points:

1. The Sherman Antitrust Act is only applicable to cases directly affecting interstate commerce.
2. To the extent that a state has legislated concerning the delivery into, or use within, such state of intoxicating liquors, such legislation is paramount, and to the extent thereof, intoxicating liquors have been removed from interstate commerce and the jurisdiction of Federal laws, the application of which is dependent upon interstate commerce.
3. An indictment for violation of the Sherman Act must show that interstate commerce has been directly affected and the indictment in this case is deficient in this respect.
4. A combined intent and purpose to comply with the laws that the states have enacted pertaining to intoxicating liquors cannot constitute a violation of Section 1 of the Sherman Act.

ARGUMENT.

I.

THE SHERMAN ANTITRUST ACT IS ONLY APPLICABLE TO CASES DIRECTLY AFFECTING INTERSTATE COMMERCE.

The Federal jurisdiction depends solely on the “commerce clause” of the Constitution. Unless the acts charged constitute a direct and substantial burden on interstate commerce, the indictment falls.

"The Sherman Anti-trust Act, 15 U.S.C.A., sections 1-7, 15 note, derives its authority from the power of Congress to regulate commerce among the states. *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 40 S. Ct. 385, 64 L. Ed. 649. Assuming that transactions constituting intrastate commerce may come within the provisions of the Sherman Act (*Local 167 v. United States*, 291 U. S. 293, 297, 54 S. Ct. 396, 78 L. Ed. 804), it still is necessary that appellee prove that the dealings of appellants, which form the subject matter of the complaint, operate substantially and directly to restrain and burden interstate commerce. Cf. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, *supra*.

"We do not regard the transactions complained of as creating a direct and substantial burden on interstate commerce."

Ewing-Von Allmen Dairy Co., Inc. v. C. and C. Ice Cream Co., Inc., 109 Fed. (2d) 398, 900.

See also:

U. S. v. Patten, 226 U. S. 525, 57 L. Ed. 333;
U. S. v. Trenton Potteries Co., 273 U. S. 392, 71 L. Ed. 700;
Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, 64 L. Ed. 649.

II.

TO THE EXTENT THAT THE STATE HAS LEGISLATED CONCERNING DELIVERY INTO, OR USE WITHIN, SUCH STATE OF INTOXICATING LIQUORS, SUCH LEGISLATION IS PARAMOUNT, AND TO THE EXTENT THEREOF, INTOXICATING LIQUORS HAVE BEEN REMOVED FROM INTERSTATE COMMERCE AND THE JURISDICTION OF FEDERAL LAWS, THE APPLICATION OF WHICH IS DEPENDENT UPON INTERSTATE COMMERCE.

Section 2 of the Twenty-first Amendment to the Constitution of the United States reads as follows:

“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.”

The effect of this section has been to vest in the states the unrestricted power to control the importation into and use within its boundaries of intoxicating liquors. Such legislation is not limited by the “commerce clause” of the Constitution, and to the extent that the state legislature has legislated thereon, intoxicating liquors have ceased to be an article of interstate commerce. The constitutional amendment contemplates that the right and power of the state to have full and complete control of intoxicating liquors is of greater importance than infractions of laws intended to preserve the integrity and freedom of interstate commerce, and has given state laws upon the subject priority and precedence.

This principle has been decided by the Supreme Court of the United States and has been repeatedly

declared by other Federal Courts. There can be no question of the power of the state to make valid laws excluding intoxicating liquors entirely, confining the right of sale to designated agencies, fixing prices, creating monopolies, and otherwise directly and drastically impeding and interfering with interstate commerce in that commodity.

“The Amendment which ‘prohibited’ the ‘transportation or importation’ of intoxicating liquors into any state ‘in violation of the laws thereof’, abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the state power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

“The plaintiffs argue that, despite the Amendment, a state may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer’s license fee was not imposed to that end. Surely the state may adopt a lesser degree of regulation than total prohibition. *Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations*

by confining them to a single consignee? Compare Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394; Vance v. W. A. Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 S. Ct. 674. There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the state, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? Moreover, in the light of history, *we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic.* Compare Phillips v. Mobile, 208 U. S. 472, 479, 52 L. Ed. 578, 581."

State Board of Equalization v. Young's Market,
299 U. S. 59, 81 L. Ed. 38.

"The claim of unconstitutionality is rested, in this Court, substantially on the contention that the statute violates the commerce clause. It is urged that the Missouri law does not relate to protection of the health, safety and morality, or the promotion of their social welfare, but is merely an economic weapon of retaliation; and that, hence, the Twenty-first Amendment should not be interpreted as granting power to enact it. Since that amendment, *the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.* As was said in State Bd. of Equalization v. Young's Market Co., 299 U. S. 59, 62, 81 L. Ed. 38, 40, 57 S. Ct. 77,

'The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes.' To limit the power of the states as urged 'would involve not a construction of the amendment, but a rewriting of it'. See also *Mahoney v. Jacob Triner Corp.*, 304 U. S. 401, 82 L. Ed. 1424, 58 S. Ct. 952; *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391 ante, 243, 59 S. Ct. 254. Affirmed."

Finch & Co. v. McKittrick, 305 U. S. 395, 83 L. Ed. 246.

"If the importation of intoxicating liquor is acceptable to a state, it retains its status as the legitimate subject of interstate commerce, but if it is forbidden importation by the state, the laws of the United States likewise forbid it. * * * Any state may, however, remove intoxicating liquor as a subject of interstate commerce. When it does so by passing a law on the subject of its importation, the law of the United States forbids its further importation if in violation of the laws of the state. Such is now the law and that the law was once otherwise goes for naught. * * * The traffic in intoxicating liquors is universally known to be loaded with danger to the public weal. It may be subjected to the most stringent regulation. Licenses to sell to the ultimate consumer may be limited to those who in the conduct of the business can be brought under control and supervision. The traffic is one emphatically 'fraught with public interest'. No one can claim 'the right and privilege' to do harm to others. The regulation of the traffic by state laws, in the attempt to minimize the evils attending it, is no infringement of

the rights of anyone. It is no denial of any of ‘the privileges and immunities’ of citizens of the United States.”

Premier Pabst Sales Corp. v. Grosscup, 12 Fed. Supp. 970;

Wylie v. State Board of Equalization, 21 Fed. Supp. 604;

Mahoney v. Jacob Triner Corporation, 304 U. S. 401;

Indianapolis Brewing Co. v. Liquor Control Commission, 305 U. S. 391;

Ziffrin, Inc. v. Reeves, 308 U. S. 132;

William Jameson & Co. v. Morgenthau, 25 Fed. Supp. 771.

Section 2 of the Twenty-first Amendment is very similar to the Webb-Kenyon Act. (27 U.S.C.A., Section 122.) The Webb-Kenyon Act was first enacted in 1913 and reenacted in 1935. The Act is entitled “An act divesting intoxicating liquors of their interstate character in certain cases.” It provides:

“That the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind from one State, Territory or District of the United States * * * into any other State, Territory or District of the United States * * * which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory or District of the United States, or place non-con-

tiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Long prior to the enactment of the Twenty-first Amendment, it was definitely held and established that intoxicating liquors were divested of their interstate character to the extent that the state legislated thereon. The Federal Government retained jurisdiction under the "commerce clause" only to the extent that such retention was consistent with state regulations of traffic in the commodity.

Adams Express Company v. Commonwealth of Kentucky, 238 U. S. 190, 59 L. Ed. 1267; *Sturgeon v. State* (Ariz.), 154 Pac. 1050.

As above stated, on August 27, 1935, Congress re-enacted the Webb-Kenyon Act without change. There have been a number of decisions since its reenactment holding that the states are free to regulate liquor traffic free of restriction of the "commerce clause" of the Federal Constitution.

Dugan v. Bridges, 16 Fed. Supp. 694; *General Sales and Liquor Co. v. Becker*, 14 Fed. Supp. 348; *Commonwealth v. One Dodge Motor Truck*, 191 A. 590.

Prior to the Webb-Kenyon Act the Wilson Act was enacted in 1890, which divested intoxicating liquors of their character of an article of interstate commerce to the extent that upon arrival in the state, intoxicating liquors became subject to the exercise of the police power of the state in the same manner as though such liquors had been produced in the state itself.

Consequently, one who complies with state laws and regulations pertaining to intoxicating liquors cannot be guilty of a Federal crime exclusively founded and based upon the "commerce clause" of the Constitution. Otherwise, the states' police power over this commodity, a power which the Twenty-first Amendment and the Webb-Kenyon Act expressly and deliberately preserve, would be fundamentally emasculated and impaired.

III.

**AN INDICTMENT FOR VIOLATION OF THE SHERMAN ACT
MUST SHOW THAT INTERSTATE COMMERCE HAS BEEN
DIRECTLY AFFECTED AND THE INDICTMENT IN THIS
CASE IS DEFICIENT IN THIS RESPECT.**

The very essence of a conspiracy under the Sherman Act is that it must affect "trade or commerce among the several states, or with foreign nations". This means a direct and positive effect, and not an incidental effect, upon interstate or foreign commerce. It is essential, therefore, that the indictment should definitely and succinctly cover this gist of the crime.

"From the rules of particularity and certainty already noted, the indictment or information must state specifically all the facts and circumstances necessary to constitute the offense charged. A conviction cannot be sustained where all the facts stated in the indictment might be true and still accused might not be guilty of the offense intended to be charged."

"It is a cardinal rule of criminal pleading that an indictment must portray all the facts that constitute the crime sought to be charged so that the court, from an inspection of the indictment can say that, if all the facts alleged are true, the defendant is guilty."

State v. Beliveau, 114 Me. 477, 479, 96 A. 779.

"The indictment must show on its face that if the facts alleged are true, and assuming that there is no defense, an offense has been committed. It must therefore state explicitly and directly every fact and circumstance necessary to constitute the offense, whether such fact or circumstance is an external event, or an intention or other state of mind, or a circumstance of aggravation affecting the legal character of the offense. Unless the indictment complies with this rule, it does not state the offense. The charge must always be sufficient to support itself. It must directly and distinctly aver every fact or circumstance that is essential, and it cannot be helped out by the evidence at the trial or be aided by argument and inference. With rare exceptions, offenses consist of more than one ingredient, and in some cases of many; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad."

Clark Cr. Proc., p. 153.

Inasmuch as interstate commerce is not involved in the case of intoxicating liquors to the extent of state legislation upon the subject, and inasmuch as it affirmatively appears by the indictment in this action that the states in the Pacific Coast Area have enacted

laws to control traffic therein, and that the acts of the defendants may reasonably have been in compliance with and pursuant to such laws, and to accomplish the purpose and intent thereof, the indictment is legally insufficient. Even if the indictment were silent as to the state laws, this Court will take judicial notice of the same.

“The laws of every state and territory of the Union and of the District of Columbia, whether consisting of constitution, public statutes or judicial decisions, are judicially noticed by federal courts when exercising original jurisdiction or appellate jurisdiction from another federal court.”

23 C. J. 127.

“The law of any state of the Union, whether depending upon statute or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice.”

Lamar v. Micou, 114 U. S. 218, 29 L. Ed. 94.

The Twenty-first Amendment has, in effect, provided that it is the supreme law of the land that intoxicating liquors shall not constitute an article of interstate commerce except to an extent consistent with state laws governing their importation and use. The Sherman Act is necessarily subject to this constitutional provision and it must be read into the Act itself. The Act, therefore, contains an implied provision that intoxicating liquors are without the scope thereof, except the purpose of the conspiracy and acts done in furtherance thereof are not authorized or required by state laws governing their importation and use. To the extent that intoxicating liquors have been

withdrawn from interstate commerce, the Sherman Antitrust Act has been nullified and superseded. A crime, therefore, cannot be stated without an allegation showing that the acts complained of are not authorized or required by state laws.

Everything alleged in this indictment is consistent with the innocence of the defendants. Not only that, but it affirmatively appears that many of the very acts complained of are definitely required by state laws. Intoxicating liquors differ from any other commodity. It is not sufficient to simply allege that they were shipped from one state to another. Such an allegation would constitute a sufficient statement that interstate commerce is involved in the case of other commodities. In the case of intoxicating liquors, however, interstate commerce is involved only if, in conjunction with interstate transportation, there be the added factor and element that state legislation has not restricted and regulated the importation and use of the commodity in the field in which it is claimed that its identity as an article of interstate commerce exists.

Federal jurisdiction will only exist if the states have not enacted legislation inconsistent with the Federal law and rendering it inapplicable. To the extent that the states have acted, their laws and regulations are paramount.

“In indictments in the Federal Courts, where the offense is not clearly within the Federal jurisdiction, every fact essential to that jurisdiction must be clearly and distinctly averred.”

The situation is analogous to an act that must be committed outside the jurisdiction of the state in order to give the Federal Government jurisdiction. The fact that the act has been committed outside the state jurisdiction must be distinctly averred. The Twenty-first Amendment has placed beer within the jurisdiction of the state. Facts must be alleged to show that it has been bought within Federal jurisdiction.

“In cases of this kind, where the act comes to the border line of Federal jurisdiction, it seems to us an imperative duty upon the Court to hold the pleader to a distinct and clear averment of every fact which is essential to give Federal Courts jurisdiction, and that we ought not by inference and presumption open the door so as to include matters which may or may not be an offense against the United States.”

United States v. Morrissey, 32 Fed. 147, 152.

In pursuing an inquiry as to the existence of a violation of the Sherman Act, when the commodity involved is intoxicating liquor, the first point to be determined is the effect of the operation of state legislation enacted in pursuance of the Twenty-first Amendment. That is a primary and fundamental question and it must be disposed of affirmatively in any indictment.

The very use of the word “beer” in the indictment withdraws the case from the operation of rules which appertain to and govern other subjects of commerce between the states. Beer may or may not be a commodity subject to interstate regulation by the Federal Government under the “commerce clause”, depending

upon the nature and effect of state enactments with respect thereto. In any given case, the Government must first ascertain and then plead that beer is an interstate commodity, if such is, under the laws of the state in question, the fact.

IV.

A COMBINED INTENT AND PURPOSE TO COMPLY WITH THE LAWS THAT THE STATES HAVE ENACTED PERTAINING TO INTOXICATING LIQUORS CANNOT BE CRIMINAL.

If the laws of the states contemplate that prices shall be controlled, established, regulated and maintained and that the police power of the state over liquor traffic can be facilitated by the elimination of price competition and price cutting in this commodity, a combined purpose of manufacturers to comply with and adhere to the intent and purpose of such laws cannot constitute a criminal conspiracy. The Twenty-first Amendment and the Sherman Act must be read and construed together, and the Amendment constitutes an express exception in the definition of the crime when intoxicating liquor is the article involved. A combination, the purpose and object of which is compliance with state laws and regulations governing traffic in and use of intoxicating liquors, is a combination for a lawful purpose and is necessarily excepted.

“Although conspiracy differs in many respects from crimes in general, and a purpose formed in common by more than one person may be fraught with danger and involve punishment from which a single individual is exempt, still the gist of the

offense is always the common purpose to do an unlawful act, or a lawful act by wrongful means. Either the act or the means must be wrongful.

"This count of the indictment, conforming to the terms of the act, does not charge as the common purpose an unlawful act, nor wrongful means to accomplish lawful ends, and the demurrer thereto must also be sustained."

United States v. Bernstein, 267 Fed. 299-300.

"A conspiracy is 'a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means'. *Pettibone v. United States*, 148 U. S. 197, 13 S. Ct. 542, 545, 37 L. Ed. 419; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 465, 41 S. Ct. 172, 176, 65 L. Ed. 349, 16 A.L.R. 196; and see *United States v. Hutto*, 256 U. S. 524, 528, 41 S. Ct. 541, 543, 65 L. Ed. 1073, and *Weinger v. United States (C.C.A. 9)*, 47 F. (2d) 692, 693.
* * *

"The purpose to be accomplished by the conspiracy may be either lawful or unlawful. If the purpose is lawful and is carried out by lawful means, then no offense is committed."

Marine et al. v. United States (Ninth Circuit), 91 Fed. (2d) 691, 693-694.

"To constitute a criminal conspiracy, there must be a conspiracy to do an unlawful act which amounts to a crime. *Lipschitz v. People*, 25 Colo. 265, 53 Pac. 1111. * * * The conspiracy charge had to be for some unlawful act which amounted to a crime * * * In a conspiracy charge the

alleged unlawful act which the parties have in contemplation is one of the principal ingredients of the crime; that is to say, if the acts which they are charged as conspiring to do were not unlawful, then the information does not charge a conspiracy.
* * * If the defendants had done all the things said of them in the information on January 1st, they would not have violated the prohibition statute of 1915."

Noble v. People, 180 Pac. 562, 563.

"If the object to be obtained was innocent, and if the means used were also innocent, there was no conspiracy."

Justin Seubert, Inc. v. Reiff, 164 N. Y. S. 522, 524.

"Where the purpose of the agreement is lawful, and the means used in effecting such purpose are also lawful, a conspiracy charge will not lie; and a statute which assumes to make it a crime for persons to conspire to sell their goods at prices they will sell for in the course of trade, without regard to the means to be employed, is invalid."

15 C. J. S. 1065.

CONCLUSION.

At least to the extent of state legislation upon the subject, beer has been withdrawn from interstate commerce. While with respect to other commodities an allegation of interstate shipment will be sufficient to constitute an allegation of interstate commerce, such is not true in the case of beer. It requires interstate

shipment plus another essential factor. That factor is that the state has not exercised its jurisdiction so as to either authorize or require the acts complained of. This is not a matter of defense but an essential element of Federal jurisdiction, and Federal jurisdiction is not laid without averring that the state, to which has been delegated primary jurisdiction over the subject matter, has not enacted legislation in conflict with the Federal statute, which is claimed to have been violated.

It affirmatively appears by this indictment that state laws have been enacted, the very object and purpose of which is to eliminate competition, stabilize and maintain prices. The laws are adapted to regulate traffic and they aim at uniformity in price and methods of marketing. They in effect require what the Sherman Act bans. Compliance with such laws cannot constitute a Federal crime. The state laws and Federal statutes are in conflict and under the constitutional amendment the state laws are paramount.

It is respectfully submitted that the demurrer to the indictment should be sustained.

Dated, San Francisco,
February 5, 1943.

Respectfully submitted,
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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON BREWERS INSTITUTE, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

WASHINGTON BREWERS INSTITUTE, HENRY T. IVERS, H. J. DURAND, OLYMPIA BREWING COMPANY, PETER G. SCHMIDT, ADOLPH D. SCHMIDT, COLUMBIA BREWERIES, INC., EAST IDAHO BREWING CO., INC., JOSEPH F. LANSER, HARRY P. LAWTON, E. LOUIS POWELL, CALIFORNIA STATE BREWERS INSTITUTE, JAMES G. HAMILTON, SEATTLE BREWING & MALTING CO., THE SPOKANE BREWERY, INC., WILLIAM H. MACKIE, RENE BESSE, EMIL G. SICK, GEORGE W. ALLEN, PIONEER BREWING CO., RUSSELL G. HALL, BOHEMIAN BREWERIES, INC., EDWIN F. THEIS, IDAHO BREWERS INSTITUTE, STEVE T. COLLINS, OVERLAND BEVERAGE CO., BECKER PRODUCTS CO., GUS L. BECKER, C. C. WILCOX, THE BREWERS INSTITUTE OF OREGON, GEORGE F. PAULSEN, INTERSTATE BREWING CO., G. V. UHR, PACIFIC BREWING & MALTING CO. AND JAMES E. KNAPP.

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON BREWERS INSTITUTE, *et al.*,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee. } No. 10,303

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

Washington Brewers Institute, Henry T. Ivers, H. J. Durand, Olympia Brewing Company, Peter G. Schmidt, Adolph D. Schmidt, Columbia Breweries, Inc., East Idaho Brewing Co., Inc., Joseph F. Lanser, Harry P. Lawton, E. Louis Powell, California State Brewers Institute, James G. Hamilton, Seattle Brewing & Malting Co., The Spokane Brewery, Inc., William H. Mackie, Rene Besse, Emil G. Sick, George W. Allen, Pioneer Brewing Co., Russell G. Hall, Bohemian Breweries, Inc., Edwin F. Theis, Idaho Brewers Institute, Steve T. Collins, Overland Beverage Co., Becker Products Co., Gus L. Becker, C. C. Wilcox, The Brewers Institute of Oregon, George F. Paulsen, Interstate Brewing Co., G. V. Uhr, Pacific Brewing & Malting Co. and James E. Knapp.

1. STATEMENT OF JURISDICTIONAL FACTS

On May 5, 1941, a grand jury within and for the Northern Division of the Western District of Washington returned an indictment charging the appellants and others, in two counts, with violations of Sections

1 and 3 of the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (26 Stat. 209) commonly known as the Sherman Act (Tr. 6).

Appellants were duly and regularly arraigned and granted the opportunity of filing motions and demurters directed at the indictments. Demurrs were filed by all appellants (Tr. 38) and argued. The demurrs were overruled by the District Court (Tr. 52).

Appellants entered pleas of *nolo contendere* and judgment and sentence was imposed by the court (Tr. 58 to 132 inc.).

Notices of appeal were seasonably filed by all appellants and proper orders entered pursuant to the Rules of the Supreme Court of the United States directing the payment of the fines imposed, to the Clerk of the District Court to be held in escrow pending appeal.

An order was entered pursuant to Rule VIII of the Rules of the Supreme Court of the United States for appeals after Plea of guilty or Verdict designating the time within which to file Assignments of Error and the preparation and forwarding of the Record. Assignments of Error were timely filed (Tr. 138).

In order to avoid encumbering the record by submitting the numerous identical demurrs filed by the several defendants, one such demurrer only is included in the record (Tr. 38) with appropriate stipulation (Tr. 133 and 135).

II. STATEMENT OF THE CASE

(a) The Indictment

The appellants are engaged, directly or indirectly, in the manufacture and sale of beer, an intoxicating alcoholic beverage.¹ The indictment charges, in Count I, that the appellants violated Section 1 of the Sherman Act² by combining and conspiring to raise, fix, stabilize and maintain uniform, artificial and non-competitive prices for beer sold and distributed in the States of California, Oregon, Idaho and Washington. Count II of the indictment charges the violation of Section 3 of the Sherman Act³ with respect to the Territory of Alaska. The indictment sets forth the means by which it is alleged the conspiracy was effectuated, as we shall hereinafter notice in detail.

To this indictment appellants demurred on the following grounds:

1. That the indictment as to either or both counts does not state facts sufficient to constitute a crime against the United States.
2. That it does not appear from the indictment that the matters therein charged to constitute a violation of the Sherman Anti-Trust Act are subject to or within the jurisdiction of the court.
3. That the Sherman Act is not applicable to the

¹Washington: Rem. Rev. Stat. 7306-3 *et seq.*

Oregon: Ore. Comp. Laws Ann. Sec. 24-103 *et seq.*

Idaho: Sec. 1 and 2, Ch. 132, L. 1935.

California: Sec. 2 *et seq.*, Chap. 330, L. 1935, as amended by Ch. 758, L. 1937.

²26 Stat. 209, 15 U.S.C.A. 1—See Appendix I for text.

³15 U.S.C.A. 3—See Appendix I for text.

alleged combination, conspiracy and acts pursuant thereto under the provisions of the Twenty-First Amendment⁴ to the Federal Constitution.

4. That the indictment is vague, uncertain and indefinite, because it cannot be ascertained therefrom which acts were done pursuant to state law, or in violation thereof, and which acts were not in compliance with or done pursuant to state law or laws.

ASSIGNMENT OF ERROR

The appellants assign as error the failure and refusal of the District Court to sustain their several demurrers. The assignment is

"That the court erred in overruling the defendants' demurrers to the indictment duly and regularly filed herein and overruled by the court by its order entered herein on the 19th day of January, 1942, over the exceptions of the defendants at the time." (Tr. 138-9)

⁴Article XXI Amendments to Constitution of the United States—See Appendix I for text.

ARGUMENT

Our argument will be directed to two main theses, presented in the alternative. These alternative propositions may be briefly stated thus:

I.

Since the adoption of the Twenty-First Amendment to the Federal Constitution, the Federal Government has no jurisdiction over commerce, among the several states or with the territories, in intoxicating liquor, or

II.

The Twenty-First Amendment is a continuing offer by the people of the United States, to each of the states and territories to enter and occupy the field of regulating commerce in intoxicating liquor, and when any state or territory has entered and occupied or pre-empted such field by appropriate legislative action then such occupation or pre-emption is exclusive and the Federal Government has no authority to legislate on the same subject or in the same field.

We will argue these propositions in the foregoing order with complete confidence that as a matter of law the first is sound and irrefutable but giving recognition also to the soundness and utility of the second.

We are all well aware of the epic struggles of the American electorate, and of the legislative, executive and judicial branches of the Federal and State Governments in attempting to solve the social and economic problems, both real and imaginary, inherent in the traffic in intoxicating liquor. We are here engaged in another effort to cope with the problems, an

effort which will have a lasting and important effect on the present and future.

We have passed successively, in our national history, through periods of little or no regulation, incipient and growing movements for reform and prohibition, open saloons and political abuses, county local option, state prohibition, national prohibition, lawlessness and gangsterism until we arrived at repeal of the Eighteenth Amendment and a partially new era giving birth to new and heretofore untried (insofar as the United States is concerned) methods. *Out of these new methods comes this indictment.*

Brewers located and doing business in four Pacific Coast States are indicted for violation of the Sherman Anti-Trust Act, a Federal Statute passed to prevent restraint of freedom of action in interstate trade and commerce and to prevent undue suppression or restriction of the play of competition in the conduct thereof.⁵

The Sherman Act is in truth the statutory enactment of the "laissez faire" doctrine of economics. It presumes the truism "free competition is the life of trade." Economists, moralists and lawmakers have disagreed with this doctrine, but since 1890 it has remained the policy of the United States.

However, the four states, in which the involved brewers are located and are doing business, have seen fit to adopt a different and an opposed theory of

⁵*U. S. v. Union Pac. R. Co.*, 226 U.S. 61.

American Column Etc. Co. v. U. S., 257 U.S. 377.

economics in the regulation and control of the traffic in intoxicating liquor.

During most of the history of this country some restrictions have been placed on this business. It was considered as a contributing factor in certain social evils, if not in fact inherently evil of itself. Commonly, only licensed persons were permitted to deal legally in it and conditions were laid down governing the acquisition and retention of such licenses.

In three of the states above mentioned, to-wit, Washington, Oregon and Idaho, a completely restrictive scheme, commonly known as "The State Monopoly" System, was adopted and has remained in effect.⁶ In the fourth, California,⁷ the system was not adopted but many of the restrictive provisions were enacted. Fundamentally, this system prevents free competition, outlaws many widely used business practices designed to promote sales, and exercises a complete and thorough control not only over the social conditions surrounding this traffic but the economic as well.

This system is not new. It had never been attempted in this form in the United States prior to prohibition (although South Carolina did briefly try the

⁶Washington—Chap. 62, Laws of 1933 (SS); Rem. Rev. Statutes 7306-1 *et seq.*

Oregon—Chap. 17, Laws of 1933 (2d SS); Ore. Comp. Laws Ann. 24-101 *et seq.*

Idaho—Chap. 132, Laws of 1935; Chap. 48 Laws of 1937; Chap. 242, Laws of 1939.

⁷California—Chap. 330 Laws of 1935; Deering's Act. No. 3796.

State Dispensary System) but it had been successfully enacted and enforced in other countries.⁸

These laws are diametrically opposed in theory and practice to the Sherman Anti-Trust Act. We will demonstrate that fact later by reference to specific provisions. The appellants have complied with these state laws in theory and practice, feeling that they represent a sound middle ground between open, unchecked traffic and prohibition, and feeling also that these laws gave the greatest possible guarantee (assuming their enforcement) against the rise of evils which were conceived as the cause of prohibition.

With this brief resume we will proceed to present our alternative grounds either or both of which we contend require that our demurrer be sustained.

I.

Since the Adoption of the Twenty-First Amendment to the Federal Constitution the Federal Government has no jurisdiction over commerce among the several states or with the territories, in intoxicating liquor.

In support of this contention we urge

- (a) The conflict between state and nation over the control of this subject matter and the trend of legislation and decision resulting therefrom.
- (b) The intention and belief of those who composed and presented the Twenty-First Amendment.
- (c) The actions of the states immediately following the adoption of the Twenty-First Amendment.
- (d) The decisions of the Supreme Court of the United States.

⁸Such as Sweden and Canada.

- (e) The application of fundamental principles and concepts of constitutional law.

(a) The conflict between state and nation.

Perhaps before, but at least beginning with *The License Cases*,⁹ there appeared an open conflict between state and nation over the control of the traffic in intoxicating liquor. Individual states adopted restrictive legislation and persons seeking to avoid these restrictions sought and sometimes secured the aid of the Federal Government in avoiding, circumventing or nullifying such restrictions. In *The License Cases*, *supra*, a divided court upheld the police power of the states, in its restrictions on interstate commerce to the extent that license laws of the states were recognized and shipments in interstate commerce limited to license holders. But when more restrictive state legislation was adopted the court refused to permit further interference with interstate commerce.¹⁰

Congress recognized the situation thus created and for perhaps the only time in the history of the struggle of nation and state for pre-eminence in power Congress legislated in aid of state enactments.

The first act was popularly known as the "Wilson Original Packages Act,"¹¹ by which intoxicating liquor in the original package was ostensibly removed from the protection of the Commerce clause and it

⁹46 U. S. 504.

¹⁰*Bowman v. Railway Co.*, 125 U.S. 465.

Leisy v. Harding, 135 U.S. 100.

¹¹26 Stat. 313; 27 U.S.C.A. 121—See Appendix I for text.

declared that the law of the state would attach upon arrival as though it had been originally manufactured in the state. By judicial interpretation this apparent intention was nullified.¹²

Congress then, surprisingly enough, went as far as it could in attempting to redelgate to the states, the authority delegated by the commerce clause. It passed the Webb-Kenyon Act.¹³ This act prohibited the shipment or transportation in interstate commerce of intoxicating liquor which was intended to be used or possessed in the state of destination in violation of the law of the state. This act might well be said to be the pattern of the Twenty-First Amendment.

Its constitutionality was seriously doubted by many eminent constitutional lawyers, who though having no interest in the commerce in intoxicating liquor, joined in an attack on its constitutionality. They contended that the act was an attempt by Congress to divest itself of a power specifically delegated to it by the Constitution. It was inconceivable that Congress could be permitted to do this, because if it could do it with respect to one power, it could with respect to all. They further contended that *such redelegation could be accomplished only by an amendment to the Constitution* in the manner prescribed.

¹² *Re Rahrer*, 140 U.S. 545; *Rhodes v. Iowa*, 170 U.S. 412.

See also *Adams Express Co. v. Kentucky*, 238 U.S. 190.

¹³ 37 Stat. 699; 877; 49 Stat. 877; 27 U.S.C.A. 122;
See Appendix I for text.

However, the Supreme Court upheld the constitutionality of this act,¹⁴ though with some obvious misgivings. Constitutional lawyers still considered the act doubtful and the overruling of the decision a probability.¹⁵

In the meantime, Congress went one step further and adopted the so-called "Reed Amendment".¹⁶

The wave of prohibition was growing. County and state with unexpected rapidity adopted prohibitory acts. Then followed the Eighteenth¹⁷ Amendment and the "noble experiment."

In passing, two unique characteristics of the Eighteenth Amendment should be noted.

First: It withdrew intoxicating liquor and the regulation thereof from the provisions of the Commerce clause. It prohibited *any commerce* in this commodity.

Second: It removed the distinction between *interstate* and *intrastate commerce* insofar as intoxicating liquor was concerned. It gave the Federal Government jurisdiction over all acts of commerce of every character within the territorial limits of the United States and its possessions. The states *concurrently* retained the powers they previously possessed, and were

¹⁴James Clark Dist. Co. v. Western Md. R. Co., 242 U.S. 311.

¹⁵Cong. Rec. Vol. 76, p. 4172—Remarks of Senator Borah.

Dunn v. U. S., 98 F.(2d) 119, p. 124.

¹⁶39 Stat. 1069.

¹⁷Article XVIII, Amendments to the Constitution of the United States—See Appendix I for text.

relieved from the restrictions arising under commerce clause coextensive, of course, with their separate territorial jurisdictions. This was the first and only time in American constitutional history that either of these things had ever happened. They are without precedent.

For further reference we wish to emphasize the fact that after the adoption of the Eighteenth Amendment there was no *interstate commerce* in intoxicating liquor.

During its existence there could have been no conspiracy, contract or combination in restraint of trade or commerce in intoxicating liquor which would violate the Sherman Act. True, they might violate the Eighteenth Amendment and the enforcement acts pursuant thereto, but not the Sherman Act. There could be no trade or commerce within the meaning of the Sherman Act.

We wish here and later to emphasize that this was the constitutional character of intoxicating liquor when the Twenty-First Amendment was adopted.

With the admitted failure of the Eighteenth Amendment to accomplish its purpose, and the greater evils it created, came the adoption of the Twenty-First Amendment. It did not simply repeal the Eighteenth Amendment and thus restore intoxicating liquor to its previous character. It did repeal the Eighteenth Amendment but simultaneously it redefined the constitutional status of intoxicating liquor and designated the sovereignty which should determine the legality or illegality of commerce in this commodity. It said that the state laws should determine what acts,

in commerce among the states, were illegal and *it prohibited interference with such state declaration.*

Against whom was this prohibition directed? Certainly not against citizens of the states. A declaration in the Federal Constitution that "violation of state laws is hereby prohibited" would be a nullity. The states have the sovereign and exclusive right to punish violations of their own laws, and the invasion of the Federal Government in that field would be unwarranted and ineffectual.

Who was it, who had possessed the authority to permit or direct the violation of state laws? It was the Federal Government exercising its authority under the Commerce clause. And as the past history shows, this was considered a real menace. The prohibition is obviously against the Federal Government and against all persons seeking the protection of the Federal Government under the Commerce clause.

Thus in repealing the Eighteenth Amendment, which had divested intoxicating liquor of its interstate commerce character, the Twenty-First Amendment did not reinvest it with its former interstate commerce character. This is borne out most strongly by the further points we will make.

(b) *Intention of composers and proposers of the Twenty-First Amendment.*

The text of the Twenty-First Amendment was drafted by a Sub Committee of the Judiciary Committee of the United States Senate, the Chairman having been Senator Blaine of Wisconsin. As originally drafted and presented to the United States Senate, it contained four sections. The first repealed

the Eighteenth Amendment, the second was the present second section prohibiting importation in violation of state laws, the third section gave the Federal Government concurrent jurisdiction,¹⁸ and the fourth provided for its enactment.

The Senate debate turned almost entirely upon a motion to strike the *third* section providing for concurrent jurisdiction in the Federal Government. After considerable argument it was defeated—as was an amendment to the same effect presented by Senator Glass of Virginia.¹⁹

Arguing against concurrent federal power, Senator Wagner of New York said in part:²⁰

“Mr. President, in addition to these general objections to the resolution, I desire to set forth seven specific objections.

“First: The inevitable consequences of section 3 will be that the liquor question will continue to bedevil national politics. It is unquestionably true that part of the force back of the movement for repeal was the desire to bring to an end the intrusion of that problem into the national sphere, which had served in many ways to confuse public consideration of truly national problems. Section 3 of the pending resolution perpetuates that condition.

¹⁸This proposed section read:

“Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquor to be drunk on the premises where sold.” 76 Cong. Rec. 1661.

¹⁹76 Cong. Rec. 4211-2 and 4229-30.

²⁰76 Cong. Rec. 4145.

“Second: The power of Congress ‘to regulate or prohibit’ which is conferred by Section 3, is described as ‘concurrent power’. In other words, we shall have two authorities, federal and state, simultaneously possessed of jurisdiction over the same area of regulation. The zone which each is to occupy is undefined. It is the kind of provision which unavoidably leads to confusion, conflict, and litigation. Ultimately, of course, the history of ‘concurrent power’ under this new amendment would not differ from that of ‘concurrent’ power under the Eighteenth Amendment. Instead of ‘concurrent’ the power of Congress will be dominant and absolute over the states. No other result is possible. *Two sovereignties in conflict cannot both prevail.* In this instance, as in every other instance, it will be the national and not the state authority which will be supreme; *and that is the ironical result of an amendment designed to restore to the states control of their liquor problem.*” (Emphasis added)

Concerning this same “concurrent power” section Senator Blaine said:²¹

“ * * * The purpose of Section 2 is to restore to the states by constitutional amendment *absolute control* in effect over interstate commerce affecting intoxicating liquors which enter the confines of the states. * * * My view therefore is that Section 3 is *inconsistent* with Section 2, and the two sections are *incompatible* and that Section 3 ought to be taken out of the resolution.” (Emphasis added)

And Section 3 was stricken. “Concurrent power”

²¹76 Cong. Rec. 4143.

was twice defeated. The Twenty-First Amendment went to the nation without any provision for federal authority concurrent or otherwise and was adopted.

When Senator Blaine, as Chairman of the Special Senate Committee, made his report to the Senate he described the text of this amendment in these words:²²

“ * * * When our Government was organized and adopted, the states surrendered control over and regulation of interstate commerce. This proposal is restoring to the states, in effect, the right to regulate commerce respecting a single commodity — namely, intoxicating liquor. In other words, the state * * * by reason of this provision, * * * acquires powers that it has not at this time. * * * ” (Emphasis added)

The arguments and contentions of Senators Blaine and Wagner, and their colleagues, prevailed and the Twenty-First Amendment went to the people as they advocated. The people of the nation believed that the amendment would have the effect these proposers said it would have.

(c) The actions of the States.

State legislatures were convened into session regular or special as soon as the amendment became effective and in almost every instance enacted completely comprehensive legislation on this subject. Sixteen

²²76 Cong. Rec. 4141. See dissenting opinion, 98 F. (2d) 119.

states adopted "The State Monopoly System" of which we spoke above.²³

Regardless of the form which these various laws took, in general, all of them almost without exception were more restrictive than any similar legislation prior to prohibition. Each legislative body reflected the announced intention of the people in holding tight rein on this traffic to prevent, if possible, the well advertised evils which presumably had caused prohibition.

Quite generally free and open competition was prohibited. The business of buying and selling intoxicating liquor was surrounded with restrictions preventing the use of promotional and competitive practices so common to American business. Separation of the manufacturer and wholesaler from the retailer became a common characteristic. All possible means of ownership or control, direct or indirect, of the retail outlet was forbidden to the manufacturer and wholesaler. Credit was forbidden. Price controls were provided. Advertising was restricted. Sales aids and promotional devices proscribed or severely circumscribed. Every possible restraint appeared. The laws were designed to and did wholly occupy the field both from the standpoint of the subject matter and territorial jurisdiction. Every drop of intoxicating liquor, no matter where it was manufactured or how it came

²³Idaho, Iowa, Maine, Michigan, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming; Alabama now makes the seventeenth.

to be in the state, came under the control of the law. Some even reached out beyond state borders and required a blanket coverage by state law by agreement before a manufacturer could secure permission to ship his products into the state.²⁴

Thus did the states manifest their understanding of the meaning and effect of the Twenty-First Amendment. And strictly in keeping with what Congress had said the language meant.

(d) The decisions of the courts.

Eventually and inevitably the clash of sovereignties (the old concept of federal authority under the Commerce clause and state laws adopted subsequent to the Twenty-First Amendment) brought questions to the Federal Courts. The first to reach the Supreme Court of the United States originated in California where the legislature had determined to require the securing of a license and the payment of a fee of \$500.00 for the privilege of importing intoxicating liquor—beer—into that state. Here was a state committing the cardinal sin against commerce among the states—the practice which more than any other had caused the placing of the Commerce clause in the Constitution—laying an impost upon that commerce by a state.

Certainly if the commerce clause could be violated —this was *the* violation. The lower court declared the California law unconstitutional. But the Supreme Court had no difficulty in reversing that de-

²⁴See reference to restrictive measures of this type in laws and regulations of states involved in Appendix II and III.

cision and finding the Twenty-First Amendment to mean what Congress, the people and the states had thought it meant. In *State Board of Equalization v. Young's Market*,²⁵ Mr. Justice Brandeis, speaking for a unanimous court, said:

“Prior to the adoption of the Twenty-First Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void * * * because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. The exaction of a fee for the privilege of importation would not, before the Twenty-First Amendment, have been permissible even if the state had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler’s place of business. * * *

“The amendment which ‘prohibited’ the ‘transportation or importation’ of intoxicating liquors into any state ‘in violation of the laws thereof,’ abrogated the right to import free so far as concerns intoxicating liquors. * * *

“The plaintiffs argue that, despite the amendment, a state may not regulate importations except for the purpose of protecting the public health, safety and morals; and that the importer’s license fee was not imposed to that end. Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that the state might establish a state

²⁵299 U.S. 59.

*monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee? * * **

“The plaintiffs insist that to sustain the exaction of the importer’s license-fee would involve a declaration that the amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in *other* provisions of the Constitution. The question for decision requires no such generalization.” (Emphasis added)

By the language of this decision the court unmistakably decided that intoxicating liquor was no longer an article of commerce governed by the commerce clause. It recognized that no article of interstate commerce within the constitutional meaning of that term may be subjected by the state to an impost as a condition to its importation. Insofar as intoxicating liquor is concerned, the Twenty-First Amendment “abrogated the right to import free.”

The court quite significantly held that the state’s power to regulate intoxicating liquor or importations thereof was not limited to protecting the public health, safety or morals. It illustrated the point by specifically indicating that the state could establish either a public or a private monopoly of the business free from any interference by the Federal Government.

In *Mahoney v. Joseph Trinner Corporation*,²⁶ the plaintiff contended that the state statute, which pro-

²⁶304 U.S. 401.

vided that certain imported intoxicating liquors could be brought into the state only if the container bore a label registered in the Patent Office of the United States, violated the equal protection clause of the Constitution. In determining that the statute did not violate the equal protection clause the court said:

“The sole contention of the Joseph Trinner Corporation is that the statute violated the equal protection clause. The state officials insist * * * that since the adoption of the Twenty-First Amendment the equal protection clause is not applicable to imported intoxicating liquor. * * * we are of the opinion that the latter contention is sound, * * * .

“*First*: The statute clearly discriminates in favor of liquor processed within the state as against liquor completely processed elsewhere. * * * That, under the amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic was settled by *State Board of Equalization v. Young's Market*, 299 U. S. 59, 62, 63.”

Thus the second of the cardinal sins against commerce among the states, which gave rise to the commerce clause was wiped out. The states were no longer restricted from discriminating between commerce within and commerce from without the state.

In *Indianapolis Brewing Co., Inc. v. Liquor Control Commission*,²⁷ and *Joseph S. Finch & Co. v. McKittrick*,²⁸ the court considered certain “anti-discrimina-

²⁷305 U.S. 391.

²⁸305 U.S. 395.

tory" legislation adopted by the states of Michigan and Missouri. These acts prohibiting the importation into the respective states of intoxicating liquor manufactured in other states which were declared to have enacted legislation discriminating against the products of Michigan and Missouri, were attacked on the ground that they violated the commerce, due process, and equal protection clauses of the Constitution.

In declaring the laws to be valid, the court said, in the *Indianapolis Brewing* case:

"Since the Twenty-First Amendment * * * has held in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and as held by that case and *Mahoney v. Joseph Trinner Corp.*, 304 U.S. 401, 58 Sup. Ct. 952, 82 L. ed. 1424, discrimination between domestic and imported intoxicating liquor or between imported intoxicating lqvor, is not prohibited by the equal protection clause. The further claim that the law violates the due process clause is also unfounded. The substantive power of the state to prevent the sale of intoxicating liquor is undoubted. *Mugler v. Kansas*, 123 U.S. 623, 8 Sup. Ct. 273, 31 L. ed. 205."

In the *Joseph S. Finch* case the court used the following language:

"The claim of unconstitutionality is rested in this court substantially on the contention that the statute violates the commerce clause. It is urged that the Missouri law does not relate to protection of the health, safety and morality, or the promotion of their social welfare, but is merely an economic weapon of retaliation; and that,

hence, the Twenty-First Amendment, * * * should not be interpreted as granting power to enact it. Since that amendment, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."

In *Ziffrin, Inc. v. Reeves*,²⁹ the appellant had continuously received whiskey from distillers in Kentucky for transportation to consignees in Chicago, and was operating as a contract carrier under a permit issued by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act of 1935. In 1938 the State of Kentucky enacted the Alcohol Beverage Control Law, which, among other things, provided that only motor carriers holding a transporter's license from the State of Kentucky could transport distilled spirits or wine. Appellant sought to enjoin the enforcement of this act, having been denied a license by the state. In summing up the appellant's contention, the court said:

"The complaint charges that the control law is unconstitutional because repugnant to the commerce, due process and equal protection clauses of the Federal Constitution in that, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Also: Intoxicating liquors are legitimate articles of interstate commerce unless federal law has declared otherwise."

In disposing of these contentions the court said:

"The Twenty-First Amendment sanctions the

²⁹308 U.S. 132.

right of a state to legislate concerning intoxicating liquors brought from without, *unfettered by the commerce clause*. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect to them * * *.”

* * * * *

“Kentucky has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils, and secure payment of revenue. The statute declares whiskey removed from the permitted channels contraband, subject to immediate seizure. This is within the police power of the state; and *property so circumstanced cannot be regarded as a proper article of commerce*. *Sligh v. Kirkwood*, 237 U.S. 52, 59, 35 Sup. Ct. 501, 502, 59 L. ed. 835; *Clason v. Indiana*, 306 U.S. 439, 59 Sup. Ct. 609, 83 L. ed. 858.” (Emphasis added)

(e) ***The application of fundamental principles and concepts of constitutional law.***

We must start with the axiomatic principle that the Federal Government is one of specifically delegated authority enlarged only by the well established doctrine of implied powers necessary to the exercise of those specifically granted. The Federal Government has no natural—essential—residuary of sovereignty.

The Federal powers are limited by specific grants. The residue of total sovereignty is in the states or in the people. That is an uncontradictable fundamental of the American Federal System. To insure the uncontestedness of this constitutional principle the Tenth Amendment to the Constitution³⁰ was adopted. From these constitutional principles we derive these considerations:

- (a) Upon the adoption of the Constitution, intoxicating liquor was an article of commerce governed by the same principles as any other article of commerce—under the commerce clause.
- (b) The status of intoxicating liquor was changed by the attempts of Congress to redelegate to the states complete control over this subject by the Wilson Act, the Webb-Kenyon Act, and the Reed Amendment—all stripping intoxicating liquor of its interstate character.
- (c) The Eighteenth Amendment settled for its life-span the status of intoxicating liquor. It was no longer an article of commerce. It was—by the people—forbidden in commerce. Congress was denied the power of “regulation.” That which had previously been the subject of regulation was forbidden to Congress in the field of regulation. Congress could only aid the prohibition of the Amendment.
- (d) After the Eighteenth Amendment intoxicating liquor had the same status it would have had if it had been forbidden originally in the Constitution. It was

³⁰ Article X, Amendments to Constitution of the United States.

not an article of (interstate) commerce in the same sense as if it had been prohibited in the original draft of the Constitution.

(e) When the Twenty-First Amendment was drafted intoxicating liquor was not an article of commerce. It was in the same position as if the Federal Government had never secured any jurisdiction, except such as the Eighteenth Amendment provided.

(f) The Twenty-First Amendment delegated no authority to the Federal Government, *unless it was the duty to insure the enforcement of state laws insofar as state laws made the traffic illegal.* The sole Federal function was to aid in the insurance of the complete sovereignty of the states.

(g) Since “commerce clause” control over intoxicating liquor was withdrawn by the Eighteenth Amendment, it is still denied to the Federal Government because it was not returned by the Twenty-First Amendment.

(h) The Twenty-First Amendment made *state laws* the test of illegality and legality of commerce among the states—in intoxicating liquor.

(i) Therefore, no federal law enactment pursuant to the commerce clause (such as the Sherman Act) can be a criterion of legal or illegal action.

We could go back to the *Young* case and others following to support this proposition. Lest we be charged with begging the question we will refrain. We will content ourselves with more general and fundamental principles.

When the state delegated authority over commerce

among the states to Congress, it did so to accomplish the suppression of these evils to-wit:

- (1) Impediments to freedom of commerce.
- (2) Imposts, duties and onerous burdens.
- (3) Discrimination in favor of residents of a state against those residing in the United States outside of the state.
- (4) The rivalries of local governments.

Summarizing these axiomatic pronouncements, Chief Justice Hughes said:³¹

“It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. *It is of the essence of this power that, where it exists, it dominates.* Interstate trade was *not left to be destroyed or impeded by the rivalries of local governments.* The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring ‘uniformity of regulation against conflicting and discriminating state legislation.’ By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. * * * Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the

³¹*Houston & Texas Ry. Co. v. U. S.*, 234 U.S. 342.

final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the nation, would be supreme within the national field."

We have selected this quotation because it is apt. It recognizes the existence of two co-existent sovereignties both of whom might lay claim to "regulation of commerce among the states." It recognizes that *one* and only one of the conflicting sovereignties *must* possess *dominant* power.

We must admit that under the commerce clause this dominant power (*exclusive* power) was in the Federal Government. But what about the Twenty-First Amendment? What about those Supreme Court decisions which held that under the Twenty-First Amendment the *purpose* (purposes) of the commerce clause was defeated—and the powers revested in the states?

Let us again examine the purposes of the commerce clause and the effect of the Twenty-First Amendment in the light of Supreme Court decisions.

- (1) The commerce clause was designed to prohibit imposts and duties among the several states.³²
 - (a) But under the Twenty-First Amendment imposts and duties imposed by the States are legal and valid and not "limited by the commerce clause."³³
- (2) The commerce clause was designed to prevent and prohibit discrimination in favor of the resi-

³²*Minnesota Rate Cases*, 230 U.S. 352; *Robbins v. Taxing Dist.*, 120 U.S. 489.

³³*State Board etc. v. Young's, supra* (299 U.S. 59).

dent of a state and against those residing in the United States outside of such state.³⁴

(a) But under the Twenty-First Amendment such discrimination is legal and no provision of the Federal Constitution can affect it.³⁵

(3) The commerce clause was designed to prevent the impediment of the rivalries of local government.³⁶

(a) But the Supreme Court has said that local governments under the Twenty-First Amendment may exercise their rivalries without fear of the prohibition of the commerce clause against such impediment.³⁷

Thus, the constitutional dominancy of the commerce clause in the Federal Government has been destroyed by the Twenty-First Amendment insofar as intoxicating liquor is concerned and the *dominancy of state legislation, of state sovereignty*, has been established.

One sovereignty or the other must be dominant—exclusive. Both cannot exist simultaneously. Our constitutional philosophy denies the existence of a concurrent jurisdiction. The Eighteeneth Amendment

³⁴*Scott v. Donald*, 165 U.S. 58; *Gregg Dyeing Co. v. Query*, 286 U.S. 472; *Baldwin v. Seelig*, 294 U.S. 511.

³⁵*Mahoney v. Joseph Trinner etc.*, *supra* (304 U.S. 401).

³⁶*Houston & Texas Ry. Co. v. U. S.*, *supra* (234 U.S. 342).

³⁷*Indianapolis etc. v. Liq. Cont. Comm.*, *supra* (305 U.S. 391).

Joseph S. Finch & Co. v. McKittrick, *supra* (305 U.S. 395).

attempted to establish such *concurrent jurisdiction*. But when that amendment was repealed Congress refused to submit to the people a measure which would have continued some concurrent jurisdiction. Twice the Senate defeated such proposition—emphatically. It was never presented to the House or to the people. Congress reflected the sentiment of the people on this subject. While historically the Federal Government had been gaining authority of a centralized character in ever progressive steps—even Congress itself tried to return control over intoxicating liquor to the states. The measures dealing with this subject are opposed to the general trend of the times. Only public opinion could explain this *reverse tendency*.

It should be remembered that we are dealing with regulation of the traffic in *intoxicating liquor* in this indictment. Is the regulation which governs the—Sherman Act—or—the laws of the states involved—both or either are in the same field of regulation. Justice Story, laying down the underlying principles of regulation said:³⁸

“The full power to regulate a *particular subject* implies the whole power, and leaves no residuum. A grant of the whole is *incompatible* with the existence of a right in another to any part of it. *A grant of power to regulate necessarily excludes the action of all others who would perform the same operation on the same thing.*”
 (Emphasis added)

We dare to paraphrase Story—if one of two conflicting sovereignties is given the power to regulate

³⁸Story on the Constitution (5th ed.) Sec. 1067.

a particular subject—that power is denied to the other sovereignty. The logic of the proposition is irresistible.

How shall the legality or illegality of any importation or transportation into a state be judged? What is the criterion? Under the Twenty-First Amendment it is the law of the state. If an act of importation is illegal it is because the law of the state says it is illegal. Conversely, if the act is legal it is because the law of the state does not say it is illegal. The test is the law of the state—not the Federal law.

Before the adoption of the Federal Constitution the state law was supreme as to all commerce—interstate or otherwise.³⁹ The Federal Constitution created the concept of interstate commerce and vested jurisdiction thereof in the Federal Government for acknowledged reasons. The Eighteenth Amendment removed intoxicating liquor from the commerce clause; without impairing the power and authority of the states but relieving the states from the limitations of the commerce clause;⁴⁰ the Twenty-First Amendment in repealing the Eighteenth Amendment *did not* restore the power of the Federal Government but reserved to the states the exclusive control over the regulation of traffic in intoxicating liquor among the states.

From these considerations we believe it to be self evident that the Sherman Act—based on the com-

³⁹See Gavit—The Commerce Clause (1932) page 100, Sec. 56.

⁴⁰*U. S. v. Lanza*, 260 U.S. 420.

merce clause solely—is not applicable to the facts set forth in the indictment and hence the indictment states no facts sufficient to constitute an offense against the United States. The demurrers should have been sustained.

II.

The Twenty-First Amendment is a continuing offer by the people of the United States, to each of the States and Territories to enter and occupy the field of regulating commerce in intoxicating liquor, and when any State or Territory has entered and occupied or preempted such field by appropriate legislative action then such occupation or preemption is exclusive, and the Federal Government has no authority to legislate on the same subject in the same field.

In advancing this proposition, we do not admit any weakness in our first argument. We, however, realize the force of certain factual situations which might be presented to the court with effect. This proposition we frankly consider one of utility. It is an alternative method of reasoning.

We have encountered a reluctance born of the feeling that any physical transportation of a commodity between states must constitute interstate commerce within the meaning of the commerce clause of the Constitution. We realize that throughout the constitutional history of the United States the “concept of interstate commerce” has become so embodied in the judicial and legal mind that the mere statement that a transportation of a commodity between two states does not come within the purview of the commerce clause meets with an immediate and indignant denial.

Because of the wording of the Twenty-First Amendment and the decisions of the Supreme Court pursuant thereto, it must be readily admitted that where the state has enacted a law making a particular act illegal, or where a state law legalizes a specific act or makes mandatory the doing of a definite act, then the state law must govern and federal laws will not apply. However, again because of the peculiar wording of the Twenty-First Amendment it seems inconceivable to most persons that there could be a condition where a state having failed to legislate specifically on the subject, the traffic in intoxicating liquor should be free of any regulation. Perhaps the horrors of such a situation would not be quite so obvious if the commodity dealt with were something other than intoxicating liquor.

It is, of course, a proper answer to any such argument that if the states are vested with the exclusive right to regulate commerce among the states in intoxicating liquor, then the state has the right to determine whether that commodity should be subjected to any regulation at all, and if so, to what extent, and the state has this right without any superimposed control in the Federal Government.⁴¹

⁴¹In dealing with intoxicating liquor in *Leisy v. Hardin*, 135 U.S. 100, the court said:

“Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted * * * but, on the contrary * * * it (congress) thereby in-

The reverse of this very situation developed early in the determination of the power of the federal government under the commerce clause. The federal courts found that many difficult questions arose where the state, in the proper exercise of its police power, enacted statutes which had the effect of either directly or indirectly affecting or burdening interstate commerce. Out of a multitude of such conflicts there developed certain principles.

(1) Where the subject of the conflict is national in character in the sense that uniformity of regulation is necessary or desirable throughout the United States, then the authority of Congress under the commerce clause is exclusive to the extent that if Congress fails to act within the field involved, such failure is tantamount to an affirmative declaration that there should be no regulation within that field, and the states are powerless to act.

(2) If the subject matter of the controversy is not national in character, inherently requiring uniformity of regulation throughout the United States, but is of local nature then if Congress fails to act the states, in the proper exercise of their police power, can enact statutes within the field which affect interstate commerce, but once Congress enters the field and provides regulation, then the states can no longer legislate in that field in any manner which directly or indirectly burdens, impairs or impedes interstate commerce, or which conflicts with congressional action.

dicates its will that such commerce shall be free and untrammeled."

The Supreme Court has stated this principle in this language:

"But that was because Congress, although empowered to regulate that subject, had not acted, and because the subject is one which falls within the police power of the states in the absence of action by Congress. * * * The inaction of Congress, however, in no wise affected its power over the subject. * * * and now that Congress has acted, the laws of the states, insofar as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. * * *"⁴²

"Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state * * *. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. * * *"⁴³

Drawing an analogy between the present conflict created by the Twenty-First Amendment and the commerce clause is, of necessity, imperfect because

⁴²Second Employer's Liability Cases, 223 U.S. 1, at 54-55.

⁴³*Adams Exp. Co. v. Croninger*, 226 U.S. 491, at 504-5.

See also *N. Y. Cent. R. R. Co. v. Winfield*, 244 U.S. 147; *Chi. R. I. & Pac. Ry. Co. v. Hardwick, etc.*, 226 U.S. 426.

the two sovereignties being dealt with in reverse positions are not sovereignties on the same plane. In construing the power of the federal government under the commerce clause, the court was dealing with a delegated authority to be strictly construed, the people having reserved to themselves or to the states all powers not delegated. From this principle sprung the conclusion that if Congress had not acted in a field which did not inherently require uniformity of regulation, then it followed that a reserved power still rested in the states, particularly if the subject concerned the health, safety or morals of the people. The reverse of this proposition cannot, however, be true —that is, if the people delegate to the states and deny to the federal government a part or the whole of any specific power, there exists in the federal government no residue or natural depository of sovereignty out of which it can claim a power reserved from the delegation to the states.

However, for the purpose of argument, let us assume that the principles established with respect to the exercise of authority by the Federal Government under the commerce clause are applicable in the reverse situation created by the Twenty-First Amendment. Certainly the Twenty-First Amendment conclusively establishes that the commerce in intoxicating liquor is not a subject national in character requiring uniformity of regulation throughout the United States. That consideration was one of the underlying causes of the repeal of the Eighteenth Amendment and the enactment of the Twenty-First, as we have heretofore demonstrated. The language

of the Twenty-First Amendment conclusively presumes varied treatment in each of the states.

From the mere statement of this principle two conclusions can be drawn—First, that the delegation of authority to the states by the people under the Twenty-First Amendment dealing with a subject calling for diverse treatment by each state, must be exclusive from its very nature, just as congressional jurisdiction is exclusive with respect to subjects necessarily requiring uniform treatment nationally.

Second, that the power delegated to the states under the Twenty-First Amendment by the people dealing with a subject not national in scope creates the situation that the federal law will continue to apply until the states have entered the field, but once the states enter the field then the federal no longer applies.

Assuming for the sake of argument that this latter proposition is sound, we will demonstrate that with respect to all of the charges of the indictment the states involved have entered the field both generally and specifically in such manner as to exclude the possibility that the Sherman Act does apply.

State Acts Generally Regulating Subject Matter

Each of the states involved in this indictment has adopted a comprehensive liquor control statute. In Washington, Oregon and Idaho the acts are monopolistic with respect to all spirituous liquors and are in restraint of trade as to beer. In the State of California the statute is not monopolistic, provides a licensing system for all alcoholic beverages, and is in restraint of trade as to beer.⁴⁴

⁴⁴See Notes 6 and 7, *supra*.

Referring generally to the restraints of trade with respect to beer, all of these regulatory states control, by specific enactment of the legislature or by regulation of the liquor control authority adopted pursuant to statute, price, advertising, trade promotions, labeling and containers, define who may buy, who may sell and under what conditions, determine the character of each person in the retail, wholesale or manufacturing trade, prohibit an identity of interest of any character between wholesalers and manufacturers on the one hand and retailers on the other.⁴⁵

All of these acts are designed to restrict and restrain free competition and the use of methods designed to promote or increase consumption, acts generally known as sales stimulants, and methods generally used by manufacturers and distributors of commodities to induce retailers to push the sale of their particular brands.⁴⁶

Each of these acts covers every business transaction in beer within the geographical boundaries of each state and leaves no act which is not specifically covered by statute or regulation. Each of these acts controls carriers in both inter and intrastate commerce in the transportation of intoxicating liquor, including beer, setting forth the methods by which and the conditions upon which they may transport and deliver these commodities. Each of these acts defines who may bring into or receive within the state intoxicating liquor and upon what conditions such importation shall be made. In three of these states no

^{45, 46}See Appendix II for analysis of these provisions.

manufacturer of beer may ship into the state any of its products unless it has first secured from the state a certificate of approval giving it the right to send its product into such states. There is no function or operation in the commerce in intoxicating liquors which is not specifically dealt with in each of these acts.⁴⁷

Each of the states involved in this indictment has, therefore, entered the field of regulating the commerce in intoxicating liquor, and in a comprehensive manner. It must follow from this, therefore, that the Sherman Act, which attempts to regulate the same subject matter in the same field, can no longer operate with respect to intoxicating liquor insofar as the trade and commerce within or between Washington, Oregon, Idaho and California is concerned.

Perhaps no more obvious conflict of sovereignties could be presented than that which here appears. The Sherman Act in effect says that there shall be free and unrestrained competition in the traffic in intoxicating liquor, while the acts of the states say that there shall be no free, open and unrestrained competition in intoxicating liquor. Under these circumstances, and under the Twenty-First Amendment, who shall determine which economic policy shall apply to this commerce?

State Acts Specifically Regulate Matters Alleged in Indictment

In addition to generally occupying the field regulating the subject matter covered by the indictment, the

⁴⁷See Appendix II for analysis of these provisions.

laws of the four states involved specifically deal with the acts alleged to constitute the conspiracy in violation of the Sherman Act. We will set forth the paragraphs of the indictment dealing with each of the subject matters and will direct the court's attention to the provisions of state laws dealing with these same specific subjects, and will, in an appendix hereto, set forth *in extenso* the provisions of the state laws and regulations to which we here refer.

Prices

Paragraph 16 (Tr. 18) charges generally a violation of the Sherman Act with respect to prices. Paragraph 17 (Tr. 19) of the indictment purports to set forth the means by which the alleged violation occurred. Sub-paragraphs (b), (c), (f), (i), (j), (k), (m), (n) and (o) deal with the subject of prices, price control, price posting, zoning for pricing purposes, enactment of and compliance with state requirements, and other alleged restraints with respect to prices. Each of the states involved has enacted, by legislative act or regulation pursuant thereto, provisions controlling prices, the fixing of prices, compliance with prices, and other matters relative thereto. In the State of Washington, by legislative enactment,⁴⁸ the Washington State Liquor Control Board is empowered to regulate generally and specifically with respect to "regulating the sale of beer * * *." By regulation the Washington State Liquor Control Board has defined and established zones for the pur-

⁴⁸Rem. Rev. Stat. §7306-79—See Appendix III for text of law.

pose of fixing and establishing prices, has required that every importer, wholesaler and manufacturer of beer shall post prices on a delivered basis to retail licensees in each zone and allowance for the return of empty containers, requiring that beer be sold only at prices as posted, and that they may not be changed except after 10 days from the time a new posting is filed with the Board, and prohibiting any prices involving quantity discounts. This regulation further requires the filing of a memorandum or written contract of every agreement between a beer wholesaler or importer on the one hand and a brewer manufacturing the product on the other, setting forth the prices and all terms of sale, and requiring that no sale can be made unless such agreement or memorandum is on file, and that no changes shall be made until a new contract or memorandum is filed with the Board. This regulation further provides that all such postings and contracts shall be open to inspection, and shall not be confidential.⁴⁹

The State of Oregon, by legislative enactment, has empowered the Oregon Liquor Control Commission "to control the * * * sale, purchase, transportation, importation * * * of alcoholic liquor * * *," and to adopt regulations.⁵⁰

By regulation the Oregon Liquor Control Commission requires the posting of prices by trade areas, both

⁴⁹Regulation 49, Wash. St. Liq. Cont. Bd.

See Appendix III for text.

⁵⁰Ore. Compl. L. Ann. Sec. 24-106.

See Appendix III for text.

as to retail and wholesale sales, permits such filings only on or before the 20th day of each month preceding the month in which such prices shall become effective, and which may be changed and modified only by filing another schedule on or before the 20th day of any subsequent month, with such change becoming effective on the 1st day of the following month, and providing that when any amended schedule is filed by any licensee on or before the 20th of the month other licensees shall have the right to meet such new filing, but not file any lower prices, at any time before the 1st day of the month immediately following, and requiring adherence to prices so filed, and providing for the uniformity of such prices among trade buyers of the same class in the same trade area. This regulation also provides for the posting of prices on malt beverages to be closed out upon condition that the licensee filing such closing out prices shall not handle the same item for a period of twelve (12) months thereafter.⁵¹

The State of California, by legislative enactment,⁵² provides that each manufacturer, importer and wholesaler of beer shall file a written schedule of prices to be charged, such schedule of prices to be charged only upon 10 days notice by the filing of a new or amended schedule, but providing that other licensees may meet but not post lower prices than such new filing to become effective upon the same date as such

⁵¹Regulation 10, Ore. Liq. Cont. Com. See Appendix III for text.

⁵²Sec. 38e. See Appendix III for text.

new filing, that such postings shall be open to public inspection, and that such prices as filed shall be strictly adhered to, and providing that the State Board of Equalization may adopt other rules and regulations to foster and encourage orderly wholesale marketing and distribution of beer.

By legislative enactment in the State of Idaho⁵³ it is provided that all licensees shall file schedules of prices uniform for the same class of buyers in the same trade area, that such prices shall be on a delivered basis, that there shall be filed return allowances for containers, that any change or modification of such schedule of prices shall become effective not less than ten (10) days after the filing of new or amendatory schedules, that all prices must remain in effect for a minimum of ten (10) days, that price schedules shall be open to public inspection, and that all prices shall be adhered to strictly.

Classification of Purchasers

Paragraph 17 (d) (Tr. 21) of the indictment charges that the defendants violated the Sherman Act by establishing classifications of purchasers of beer and the prices to be charged each such classification. Each of the states involved has adopted definitions of manufacturers, wholesalers, importers and retailers. Each of the price control regulations previously referred to requires classification of purchasers and sellers of beer into manufacturers, wholesalers, importers and retailers, and requires a distinctive price

⁵³Sec. 6, Ch. 132, L. 1935 as amended. See Appendix III for text.

treatment of each classification and by each classification.⁵⁴

Control of Containers

Paragraph 17 (e) (Tr. 21) alleges that uniform types of bottles, containers and packages were used in the Pacific Coast Area and uniform refunds and allowances for the return of empty containers were established. The laws of Washington and Idaho provide for the regulation of bottles, containers and packages, a regulation of the Washington Liquor Control Board specifies the sizes of bottles, cases and barrels which may be used, and the Idaho statute contains a specification of the size of bottles and barrels. The State of California by statute provides the maximum size for bottles and minimum size for barrels.

Each of the laws and regulations forbids the giving of a rebate by any means. Uniformity of refunds and allowances for interchangeable containers is a necessary result of anti-rebate provisions. Any manufacturer or wholesaler who paid a larger amount for the refund upon the return of empty bottles or containers than was originally paid by the licensee would be effecting a rebate to the extent of such excess.⁵⁵

Coercion of Wholesalers

Paragraphs 17 (g) and (m) (Tr. 22-26) allege that the defendants coerced wholesalers, distributors,

⁵⁴See Appendix III for texts of price control provisions.

See Appendices II and III for references to classifications.

⁵⁵Texts in Appendix III.

importers and retailers to adhere strictly to price levels established and refused or suspended shipments of beer to those who failed. Undoubtedly this allegation is intended to apply principally to the State of Washington and the district in which the indictment was returned. The statute of the State of Washington provides that manufacturers shall be responsible for the conduct of wholesalers handling their product and may be punished for violations by the wholesaler, even though there is no evidence that the manufacturer participated in the violation, the infliction of the punishment being wholly within the discretion of the Liquor Control Board. Furthermore, the price posting regulation of the Washington Liquor Control Board requires that the manufacturer or importer post the price at which their respective products shall be sold in the various zones in the State of Washington, and wholesalers are required to follow such price postings. There is no provision for a wholesaler making an independent posting of his own.

Similarly the law of California provides that any person participating or aiding in the violation of the price posting provisions of the statute shall be guilty of a violation to the same extent as the person committing it.⁵⁶

Distressed Beer

Paragraph 17 (h) (Tr. 23) alleges that the defendants agreed to and did repurchase beer from wholesalers, distributors, importers and retailers of what it alleges the industry describes as distressed

⁵⁶Text in Appendix III.

beer. Regulation 50 of the Washington State Liquor Control Board, and Regulation 10C of the Oregon Liquor Control Commission, describe in detail the procedure to be followed in the repurchase of damaged or distressed merchandise. A further paragraph of Regulation 10A of the Oregon Regulations provides that a wholesaler who desires to close out a particular brand at other than his posted price may do so on special permission from the Oregon Liquor Control Commission, but if he avails himself of this provision he may not sell the item so closed out for a period of twelve months thereafter. This regulation also refers to distressed beer. Sec. 55.5 of the California law provides that before any licensee sells as distressed merchandise a trade marked or branded beer subject to a fair trade contract he shall offer such beer to the manufacturer.⁵⁷

Inducement of Outside Brewers

Paragraphs 17 (n) and (o) (Tr. 27) allege that the defendants attempted to and did induce brewers located outside the Pacific Coast Area to abide by price levels agreed upon and posted, and to refrain from selling to wholesalers who failed to adhere to such prices as posted. The laws of Washington and Idaho and a regulation in California require all outside brewers to secure from the respective liquor control authorities what is known as a certificate of approval or of compliance. This certificate is issued after an application by an outstate manufacturer for permission to sell his product within each of the re-

⁵⁷Text in Appendix III.

spective states and conditioned upon his filing with the liquor control authority a written agreement by which the manufacturer agrees that he will abide by all of the provisions and the laws and regulations of each state, and will cause all of his agents to do so. If such manufacturer fails to live up to the agreement the penalty provided is the cancellation or suspension of the certificate and refusal of permission to ship any more of his product into the state. His shipments, therefore, must be made only to designated licensees and he must abide by all of the price posting and similar regulations, and in those cases where the law so provides he must accept the responsibility for those who handle his product. Both he and his representatives must adhere to the prices posted, and if they depart therefrom such departure would constitute a violation which would render the certificate subject to suspension or cancellation.⁵⁸

In the three states mentioned no importer can purchase or place an order for the product of any manufacturer located outside of the state unless he first indicates his intention so to do to the liquor control authority and ascertains that a certificate of approval is outstanding.

Paragraph 17 (f) (Tr. 21) alleges that the defendants employed administrators, supervisors and investigators to police the Pacific Coast Area and to levy fines and penalties ostensibly for alleged violations of the provisions of the liquor control statutes and regulations of the liquor control authorities, but which

⁵⁸Text in Appendix III.

were for the purpose of maintaining adherence to prices. Of course, adherence to prices as posted is required by each of the laws and regulations previously referred to, and any aid that could be given to the State to insure adherence to the laws and regulations could not be a violation of law. We are unable, of course, from the allegation to determine in what area the Government intended to charge that this practice had been followed. Sec. 38 (e) of the law of California provides that trade associations representing a majority of the beer manufactured in that state are specifically privileged to enforce or aid in the enforcement of the price posting provision.

There are numerous other sections of the statutes and regulations which directly or indirectly relate to the matters covered in the indictment. We have attempted to set out those which most directly relate to the same subjects covered by the individual paragraphs of the indictment, and those merely for the purpose of illustrating the principle hereinbefore set forth—that the states have completely and specifically occupied the field of regulation with respect to the matters covered in the indictment.

In support of our second proposition it is evident that the states have fully occupied the field of regulation of intoxicating liquor and that the Sherman Act is no longer applicable.

COUNT II

Count II of the indictment, as previously noted, charges a violation of Sec. 3 of the Sherman Act and contains allegations similar to those in Count I with respect to commerce between the states in the Pacific Coast Area and the Territory of Alaska.

In the Twenty-First Amendment, as also in the Wilson and Webb-Kenyon Acts, territories are placed in the same category as states with respect to this particular subject matter. Immediately after the ratification of the Twenty-First Amendment the Territory of Alaska passed an act regulating the sale of beer and wine,⁵⁹ and an act creating a Board of Liquor Control.⁶⁰ These enactments were in turn specifically ratified by Congress⁶¹ in an act which provided that the legislative power of the Territorial Assembly be extended to include the regulation of intoxicating liquor traffic, and authorizing the legislature to delegate its authority to a board or commission, with power to make rules and regulations. This act was, of course, in aid of the Twenty-First Amendment.

Subsequently the territorial legislature adopted a new liquor control act,⁶² by which it limited the sale of intoxicating liquors to and by licensees, required brewers and wholesalers whose plant or principal place of business is located outside the territory to obtain a wholesaler's license and to establish a principal

⁵⁹Ch. 71 L. 1933.

⁶⁰Ch. 109 L. 1933.

⁶¹Secs. 2 and 3, Repeal Act for Alaska, 48 Stat. 583.

⁶²Ch. 78 L. 1937.

place of business and designate a resident agent within the territory, and providing for a malt beverage importer's license. This act also prohibits the ownership of any interest in a beverage dispensory or retail liquor store by a wholesaler or brewer, and prohibits the direct or indirect financing of or supplying of equipment or furnishings to any retailer by a wholesaler or brewer.

Since the Twenty-First Amendment places territories and states in the same category, what we have heretofore already said with respect to the states involved applies equally to the Territory of Alaska.

With respect to this count it should perhaps be called to the attention of the court that the District Court imposed a fine of \$1.00 on each of the defendants.

CONCLUSION

The appellants respectfully submit that the several demurrers filed by them should be sustained and that this action should be dismissed.

Respectfully submitted,

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APPENDIX I**SECTIONS 1 AND 3 OF THE SHERMAN ACT
26 Stat. 209**

"Sec. 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"Sec. 3. Trusts in Territories or District of Columbia illegal; combination a misdemeanor.

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

TWENTY-FIRST AMENDMENT

“Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

“Section 2. The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

“Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.”

EIGHTEENTH AMENDMENT

“NATIONAL PROHIBITION.—Resolved by the senate and house of representatives of the United States of America in congress assembled (two-thirds of each house concurring therein), that the following amendment to the constitution be, and hereby is, proposed to the states, to become valid as a part of the constitution when ratified by the legislatures of the several states as provided by the constitution:

“Sec. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States, and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

“Sec. 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

“Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the constitution, within seven years from

the date of the submission hereof to the states by the congress.”

WILSON ORIGINAL PACKAGES ACT

“Sec. 121. *State statutes as operative on termination of transportation; original packages.* All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”

WEBB-KENYON ACT

“Sec. 122. *Shipments into states having dry laws; prohibition.* The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.”

APPENDIX II.**ANALYSIS OF LIQUOR CONTROL ACTS AND REGULATIONS OF WASHINGTON, OREGON, CALIFORNIA AND IDAHO**

(Laws referred to herein are as follows: Washington—Rem. Rev. Stat. and Regulations of Washington Liquor Control Board.; Oregon—Comp. Laws Ann. and Regulations of Oregon Liquor Control Comm.; California—Chap. 330, Laws 1935, as amended by Ch. 758, Laws 1937, Rules State Board Equal.; Idaho—Ch. 132, Laws 1935, as amended by Ch. 48, Laws 1937 and Ch. 242 Laws 1939.)

The laws of Washington and Oregon establish a liquor control board or commission with general and specific powers to adopt regulations which when adopted have the force and effect of law (Wash. 7306-79; Ore. 24-106).

The California statute, at various places, empowers the State Board of Equalization to make rules concerning specific subjects. These are, however, not gathered under any one head in any one section.

Licenses are required for all persons manufacturing, importing or buying or selling intoxicating liquor. Each act defines manufacturer or brewer, importer, wholesaler, and various classes of retailers (Wash. 7306-23, *et seq.*; Ore. 24-118, *et seq.*; Cal. Sec. 5, *et seq.*; Idaho, Secs. 1 and 3).

Three of the laws require salesmen to have licenses, define their rights and duties, and prohibit anyone from soliciting or performing the work of a salesman without possessing such license (Wash. 7306-23-1; Ore. 24-118-16 (6); Idaho Sec. 6 (8).)

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Each of the statutes requires a license to import beer into the state, and prohibits anyone except the holders of such licenses from importing (Wash. 7306-23-G; Ore. 24-118 (1) and (6); Cal. Secs. 2 (k) and 6 (d); Idaho, Sec. 1 (c) 3).

Common carriers are required to comply with provisions of the acts in the transportation of intoxicating liquor (Wash. 7306-56; Cal. Secs. 49 and 49.2; Idaho, Secs. 1 (i) and 4 (3) (a).)

The contents and requirements for labeling are regulated (Wash. 7306-44; Ore. 24-146; Cal. Sec. 53.5 and Rule 30).

Advertising by various means is subjected to regulation (Wash. 7306-43 and Reg. 22-25 and 119 to 127; Ore. Reg. 7; Cal. Secs. 53.6 and 55; Idaho, Sec. 6 (a).)

The extension of credit is prohibited or regulated (Wash. Reg. 41 and 51 (a); Ore. Reg. 9; Cal. Sec. 55.8).

Each of the acts and regulations adopted pursuant thereto prohibits a manufacturer, wholesaler or importer from having any financial interest, direct or indirect, in any licensed retail business, or in any property on which a retail business is conducted, prohibits the giving or advancing of money or money's worth to any retailer under any arrangement, prohibits a manufacturer, wholesaler or importer from having any interest in any retail license, and prohibits a manufacturer or wholesaler from selling liquor at retail, prohibits the soliciting, giving or offering of any gifts, discounts, loans of money, premiums, rebates or furnishing, renting, lending or selling any

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equipment, fixtures or supplies, and prohibits a retail licensee from soliciting or receiving or accepting any of the foregoing (Wash. 7306-90, Reg. 18; Ore. 24-137, 24-202 to 205, Reg. 10 (d); Cal. Sec. 54; Idaho Sec. 6 (9).)

Consignment sales are prohibited in California (Sec. 54) and exclusive contracts between manufacturer or wholesaler and retailer are prohibited in Washington (Reg. 17). Sales for future delivery are prohibited in Oregon (Reg. 10 (d).)

In Appendix III we have set out the texts of the price control and container control provisions, the sections covering manufacturers' responsibilities for wholesalers' conduct, distressed beer, and certificates of approval or compliance.

The laws and regulations contain conditions surrounding warehousing, importation and exportation of beer other than those above referred to (Wash. Reg. 52 to 55 inc.; Cal. Secs. 24.26 and 24.27, Rule 10 and Sec. 6 (1); Idaho Sec. 6 (4).)

APPENDIX III

(Laws referred to herein are as follows: Washington—Rem. Rev. Stat. and Regulations of Washington Liquor Control Board.; Oregon—Comp. Laws Ann. and Regulations of Oregon Liquor Control Comm.; California—Chap. 330, Laws 1935, as amended by Ch. 758, Laws 1937; Idaho—Ch. 132, Laws 1935, as amended by Ch. 48, Laws 1937 and Ch. 242, Laws 1939.)

PRICE CONTROL PROVISIONS

WASHINGTON LAW

“Sec. 7306-79. *Board has power to make regulations.* 1. For the purpose of carrying into effect the provisions of this act according to their true intent or of supplying any deficiency therein, the board may make such regulations not inconsistent with the spirit of this act as are deemed necessary or advisable. All regulations so made shall be a public record and filed in the office of the secretary of state, together with a copy of this act, shall forthwith be published in pamphlets, which pamphlets shall be distributed free at all liquor stores and as otherwise directed by the board, and thereupon shall have the same force and effect as if incorporated in this act.

“2. Without thereby limiting the generality of the provisions contained in subsection (1), it is declared that the power of the board to make regulations in the manner set out in that subsection shall extend to

* * * * *

“r. prescribing the conditions, accommodations and qualifications requisite for the obtaining of licenses to sell beer and wines, and regulating the sale of beer and wines thereunder;”

“(49) *Beer Price Posting—Filing Contracts.* (a) *Price Posting.* Within the meaning of this regulation, the term ‘zone’ shall mean such ‘zones’ as shall from time to time be fixed and adopted by the board as trade areas within and for which price postings shall be made and filed as in this regulation provided.

“Every licensed brewer and every beer importer shall file with the board at its office in Olympia price postings showing the wholesale prices at which any and all brands of beer manufactured by such brewer or imported by such beer importer shall be sold in each and every zone, which prices shall be uniform for all retail licensees in any particular zone. All price postings shall be made upon forms prepared and furnished by the board and shall set forth:

“(1) All brands, types, packages and containers of beer offered for sale by such brewer or beer importer.

“(2) The delivered sale prices thereof to retail licensees within each and every zone, including allowances, if any, for returned empty containers.

“No beer wholesaler shall sell or offer to sell any package or container of beer to any retail licensee at a price differing from the price for such package or container as shown in the price posting filed by the brewer manufacturing such beer or by the beer importer importing such beer and then in effect.

“No price posting shall become effective until ten days after the actual filing thereof with the board.

“No price postings involving quantity discounts shall be made.

* * * * *

“(b) *Filing Contracts.* Every licensed brewer shall file with the board at its office in Olympia a copy of every written contract and a memorandum of every oral agreement which such brewer may have with

any beer wholesaler handling beer manufactured by such licensed brewer, which contracts or memorandums shall contain all terms of sale, including all regular and special discounts; all advertising, sales and trade allowances; all commissions, bonuses or gifts and any and all other discounts or allowances. Whenever changed or modified the changed or modified contracts or memorandums shall forthwith be filed with the board.

“Every beer importer shall file with the board at its office in Olympia a copy of every written contract and a memorandum of every oral agreement which such importer may have with any out-of-state brewery whose beer such importer imports and with any beer wholesaler handling beer imported by such importer, which contracts or memorandums shall contain all terms of sale, including all regular and special discounts; all advertising, sales and trade allowances; all commissions, bonuses or gifts and any and all other discounts or allowances. Whenever changed or modified the changed or modified contracts or memorandums shall forthwith be filed with the board.

“No licensed brewer shall sell beer manufactured by such brewer to any beer wholesaler until copies of such written contracts or memorandums of such oral agreements with such wholesaler are on file with the board.

“No beer importer shall sell any beer imported by such importer to any person whatsoever until copies of such written contracts or memorandums of such oral agreements with the out-of-state brewer manufacturing such beer are on file with the board; nor shall any beer importer sell any beer imported by such importer to any beer wholesaler until copies of such written contracts or memorandums of such oral agreements with such beer wholesaler are on file with the board.

“(c) All price postings, contracts and memorandums filed as required by this regulation shall at all times be open to inspection to all trade buyers within the state of Washington and shall not within any sense be considered confidential.

“(d) Any provision of this regulation may by order of the board be suspended or modified without notice to meet emergencies.”

OREGON LAW

“Sec. 24-106. Liquor traffic: Property: Commercial transactions: Licenses: Taxes: Enforcement of law: Adoption of regulations: Advertising by dealers: Contracts: Insurance. The function, duties and powers of the commission shall include the following:

* * * * *

“(d) To control the manufacture, possession, sale, purchase, transportation, importation and delivery of alcoholic liquor in accordance with the provisions of this Act;

* * * * *

“(h) To adopt such regulations as are necessary and feasible for carrying out the provisions of this Act, and to amend or repeal such regulations. When such regulations are adopted as herein provided they shall have the full force and effect of law.”

“REGULATION 10. A—*Posting of Beer Prices*—Licensees of the commission engaged in the business of soliciting the sales of, selling or distributing malt beverages for resale within the state of Oregon shall file with the commission at its Portland, Oregon, office a written schedule (in quadruplicate) of prices to be charged by such licensee for all malt beverages offered for sale within the state of Oregon, which said schedule of prices shall be uniform for the same class of trade buyers in the same trade area within the

state and shall set forth, (a) all brands and types of products offered for sale, (b) the delivered sale price for each size of container to retail licensees in each trade area of the state, (c) prices or maximum allowance or discounts to wholesale licensees, and (d) any allowance granted for returned containers. Such schedule of prices shall be filed with the commission on or before the 20th day of the month preceding the month in which such prices shall be in effect. A schedules of prices so filed may be changed or modified by filing with the commission at its Portland office, on or before the 20th day of any month, an amended schedule of prices which amended schedule when filed shall become effective on the first day of the following month; provided, however, that if a licensee files a schedule of prices, for all malt beverages, or an amended schedule of prices on or before the 20th of the month, all other licensees having a schedule of prices on file may file amended schedules to meet such new schedule of prices, but not lower than such new scheduled prices, at any time thereafter and before the 1st day of the month immediately following; and such amended schedules so filed shall be in effect from and after the first day of such month. Such schedule of prices shall not be withdrawn, changed or modified except in the manner hereinabove provided. When a price schedule, or an amendment or modification thereof, is filed it shall be open to public inspection. From and after the effective date of price schedules filed as hereinabove provided, the licensee filing such schedule shall make sales at the prices scheduled and at no other prices. If any licensee shall make a sale of malt beverages at any price which is a departure or variance from such licensee's posted price for such beverage such sale shall be regarded and construed as the giving of financial assistance within the meaning of the Oregon liquor control act, as amended,

Chapter 490, Oregon Laws, 1937, and the regulations of the Oregon liquor control commission.

"(2) Notwithstanding the foregoing provisions, a licensee may be permitted to make sales at other than posted prices for the purpose of closing out a brand of malt beverages, providing the licensee shall first apply in writing to the commission. Such application shall contain the brand name, the quantities of each size of container and the price thereof and shall contain a statement that the licensee will not handle such items for a period of twelve (12) months thereafter. Upon the filing of such application the Administrator shall prescribe the terms and conditions under which such closeout sales may be made, which shall include the name of the proposed vendee.

"(3) During the emergency created by the war, the Administrator is hereby authorized and directed, to receive at any time from a licensee authorized to sell or distribute malt beverages for resale, a schedule of prices for any brand or kind of malt beverages not previously offered for sale by such licensee and not already posted and being sold in the same trading area, and upon the filing of such schedule of prices to permit the sale of such malt beverages in sealed containers (bottles) immediately thereafter and without regard to provisions of Regulation 10 hereinabove set out; provided, however, that after the initial filing of a schedule of prices as in this paragraph provided, thereafter amendments to such schedule shall be filed in accordance with paragraphs 1 and 2 of Regulations 10. (Par. (3) as added August 14, 1942, effective August 24, 1942)."

CALIFORNIA LAW

"Sec. 38e. Each manufacturer, importer and wholesaler of beer shall forthwith file and thereafter maintain on file with the board, in triplicate and in such form as the board may provide a written schedule of selling prices charged by such licensee for beer sold and distributed by such licensee within the State of California for delivery and use therein; provided, however, that such schedule of prices so filed, may be changed or modified from time to time by the licensee filing the same, by filing with the board a new and complete schedule of such prices or an amendment thereto of changed or modified prices as the board may by regulation require. The first schedule of prices filed by a licensee shall be effective immediately upon filing but an amendatory schedule or amendments to a prior filed schedule shall not become effective until ten (10) days after the filing date thereof; provided, that if any licensee has filed a new schedule to meet lower posted and filed competing prices in a trade area, and such prices thus posted are not lower than such competing prices sought to be met, then such new schedule or amendments shall go into effect immediately if such competing prices are already effective, or at the same time as such competing prices become effective. Such price schedule so filed shall be subject to public inspection and shall not in any sense be considered confidential and each said licensee shall retain in his licensed premises for public inspection a copy of his effective posted and filed schedule. Upon the filing of an original schedule of prices and after the effective date of any schedule of amendatory prices, all prices therein stated shall be strictly adhered to by the filing licensee and any departure or variance therefrom by a licensee of his prices so filed and posted and in effect shall constitute and be a misdemeanor, providing that the violation

of posted prices as to each article covered by a particular sale or transaction shall not constitute a separate and single misdemeanor or violation of this section as to each such article, but each such sale or transaction involving a violation of posted prices under this section shall constitute but a single offense or violation of this section regardless of the number of articles covered by such sale or transaction.

“Any director, officer, agent or employee of any licensee who knowingly assists or aids in the violation of this section or any effective posted price or any rule or regulation of the board passed to carry out the provisions of this section shall be guilty of such violation equally with the licensee.

“The board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer; provided, that no such action shall be taken by the board except after public hearings and ten (10) days notice to all licensed manufacturers of beer in California of the time and place of such hearing and of the character of the action intended to be taken by the board.”

IDAHO LAW

“Sec. 6. *Unlawful practices.* * * * *

“(5) All licensees of the commissioner engaged in the business of selling or distributing beer for resale within the State of Idaho shall file with the commissioner a written schedule of prices to be charged by such licensee for beer sold or distributed within the State of Idaho, which schedule of prices shall be uniform for the same class of buyers in the same trade area within the State and shall set forth (a) all brands and types of products offered for sale; (b) the delivered sale price thereof in the several trade areas

of the state to the various classes of buyers; and (c) any allowance granted for returned containers. Such schedule of prices so filed may be changed or modified from time to time by filing with the commissioner a new schedule of prices, not less than ten days prior to the effective date thereof, and upon the filing of said new prices the commissioner shall give a notice thereof to all licensees as appear of record, selling or distributing beer within the State of Idaho. Such scheduled prices so filed may not be withdrawn prior to their effective date and upon becoming effective shall remain in effect for a minimum period of ten days. Such price schedules so filed shall be subject to public inspection and shall not be considered confidential. Upon the filing of the original schedule of prices, and after the effective date of any schedule of prices amendatory thereto, all prices therein stated shall be adhered to strictly, and any departure or variation therefrom shall be regarded and construed as the giving of financial assistance within the meaning of this Act."

CLASSIFICATION OF PURCHASERS

Each of the laws define and separately license manufacturers, wholesalers (or distributors), importers and retailers as described in Appendix II *supra*.

Each of the price posting provisions referred to and quoted in this appendix require different price treatment for each class of trade buyer in each trade area or zone.

Each law requires that the identity of wholesalers and retailers be kept separate as set forth in Appendix II.

In addition California has the following provision:

"Sec. 38e. * * * *

"No manufacturer, importer or wholesaler mentioned in this section shall be prohibited the right of choice of customers, nor shall any such licensee be prohibited from dividing his customers into functional classes and establish different prices for the same article for such different functional classes being based upon the manner in which such classes sell beer, as wholesaler or retailer."

CONTAINER CONTROL PROVISIONS

Washington

"Sec. 7306-69. 1. The board, subject to the provisions of this Act and the regulations, shall

* * * * *

"d. determine the nature, form and capacity of all packages to be used for containing liquor kept for sale under this Act;"

"Reg. 44. *Packages—Classification.* No manufacturer, distributor or wholesaler shall, without permission of the board, adopt or use any packages or containers for beer differing in sizes and capacities from the following classification for taxing purposes, to-wit:

"Barrels—Whole barrels, $\frac{1}{2}$ barrels, $\frac{1}{4}$ barrels.

"Packages—12 11-oz., 12 12-oz., 24 11-oz., 24 12-oz., 12 22-oz., 12 24-oz., 6 64-oz., 12 32-oz., 12 64-oz., 24 32-oz., 48 11-oz., 48 12-oz."

California

"Sec. 53.6. * * * * No beer intended for sale in the State of California, except for export, shall be contained in bottles, jugs or cans having a capacity of more than 64 ounces, nor shall beer in bottles, jugs or cans of a capacity in excess of 64 ounces be sold

to or purchased by an on-sale or off-sale licensee in the State of California, provided that nothing in this paragraph shall be construed to prohibit the possession or sale by a qualified licensee of draft or unpasteurized beer from or in metal or wood kegs of a capacity of three and one-half (3½) gallons or more."

Idaho

"Sec. 6. *Unlawful practices.* * * * *

"(6) No dealer or wholesaler shall purchase, receive or resell any beer, except in the original container as prepared for the market by the brewer at the place of manufacture. No brewer, dealer or wholesaler, shall, without permission of the commissioner, adopt or use any container for beer, differing in size from the following:

"11 oz. of beer	whole barrels
12 oz. of beer	half-barrels
22 oz. of beer	quarter-barrels
24 oz. of beer	eight-barrels
32 oz. of beer	
64 oz. of beer."	

RESPONSIBILITY FOR WHOLESALEERS CONDUCT

Washington

"7306-27-D. Every licensed brewer, domestic winery and licensed beer importer shall be responsible for the conduct of any licensed beer wholesaler in selling, or contracting to sell, to retail licensees, beer or wine manufactured by such brewer, domestic winery or imported by such beer importer. Where the board finds that any licensed beer or wine wholesaler has violated any of the provisions of this Act or of the regulations of the board in selling or contracting to sell beer or wine to retail licensees, the board may, in addition to any punishment inflicted or imposed upon such whole-

saler, prohibit the sale of the brand or brands of beer or wine involved in such violation to any or all retail licensees within the trade territory usually served by such wholesaler for such period of time as the board may fix, irrespective of whether the brewer manufacturing such beer or the beer importer importing such beer actually participated in such violation."

California

"Sec. 38e. * * * *

"Any director, officer, agent or employee of any licensee who knowingly assists or aids in the violation of this section or any effective posted price or any rule or regulation of the board passed to carry out the provisions of this section shall be guilty of such violation equally with the licensee."

"DISTRESSED" BEER PROVISIONS

Washington

"(50) *Bad Order Claims.* Bad order claims shall be made, adjusted and record thereof preserved as follows:

"(1) No bad order claim shall be allowed except by a brewer or beer importer;

"(2) No bad order claim shall be accepted unless the same shall be made by the retailer within ten days after the defect in the beer or container has been discovered;

"(3) No bad order claim shall be accepted unless the same is made by the retailer in quadruplicate upon forms furnished by the board;

"(4) After the claim has been made out in quadruplicate, one copy (blue) shall be torn from the book and retained by the retailer; one copy (yellow) shall

be torn from the book and retained by the wholesaler in those cases where the wholesaler acts as agent of the brewer in accepting the claim; the original and one copy (pink) shall be torn from the book and forwarded to, or retained by, the brewer or beer importer for action upon the claim;

“(5) At the time of making the final adjustment of the claim, the brewer or beer importer shall mail to the board the pink copy, endorsing thereon the action taken by the brewer or beer importer, together with a certification that in his opinion the claim was valid to the amount allowed;

“(6) All adjustments of bad order claims shall be made by check issued by the brewer or beer importer and payable to the retailer, bearing the bad order claim number or numbers for which adjustment is made;

“(7) All documentary evidence relating to the claim shall be preserved by the retailer and brewer or beer importer for two years after the date of submission of the claim;

“(8) No brewer or beer importer shall allow, nor shall any retailer make claim for, a bad order claim unless the container or the beer is in fact defective.”

Oregon

“REGULATION 10—A (2) Notwithstanding the foregoing provisions, a licensee may be permitted to make sales at other than posted prices for the purpose of closing out a brand of malt beverages, providing the licensee shall first apply in writing to the commission. Such application shall contain the brand name, the quantities of each size of container and the price thereof and shall contain a statement that the licensee will not handle such items for a period of twelve (12) months thereafter. Upon the filing of

such application the Administrator shall prescribe the terms and conditions under which such close-out sales may be made, which shall include the name of the proposed vendee.

* * * * *

"C—Bad Order Claims.—No licensee of the commission engaged in the sale of wine or malt beverages for resale within the state shall grant or allow any credit to a licensee of the commission on account of any claimed defect in any wine or malt beverage or container thereof unless such claim for credit shall be approved by the commission. The claim shall be made on forms obtained from the commission and in the following manner:

"1. The claimant (retailer) shall fill out the space provided in the lower left hand corner of the bad order claim, making original and three copies as provided in the bad order claim book, and mail the original copy (white) to the Oregon liquor control commission, 2505 S. E. 11th Ave., Portland, Oregon.

"2. The second (pink) and the third (yellow) copies shall be mailed or delivered immediately to the wholesaler from whom the distressed stock was purchased. The second copy (pink) shall be retained by the wholesaler.

"3. The third copy (yellow) shall be completed by the wholesaler on the space thereon provided after the inspection and approval or disapproval of the distressed stock has been made by him at the retailer's premises. This copy shall then be forwarded to the Oregon liquor control commission, 2505 S. E. 11th Ave., Portland, Oregon.

"4. The fourth or blue copy shall be retained by the claimant (retailer).

"Faulty or distressed beer or wine for which claim

is made shall be held at the retailer's premises until such time as a representative of the commission makes inspection thereof. When the claim is inspected or approved, the retailer will destroy the product in the presence of the inspector. Inspection will not be made until the commission receives the yellow copy from the wholesaler. The claiming or allowance of any fictitious or false claim in this connection shall be regarded by the commission as an act of rendering or receiving financial assistance and shall subject licenses of the offending parties to suspension or revocation at the option of the commission."

California

"Sec. 55.5. (a) No contract relating to the sale or resale of any alcoholic beverage which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others shall be deemed in violation of any law of this State by reason of any of the following provisions which may be contained in such contract:

* * * * *

"(b) Such provisions in any contract shall be deemed to contain or imply conditions that such alcoholic beverage may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such alcoholic beverage; providing, however, that at the place of any such sale and upon the goods sold and in any advertisement in connection therewith public notice is given of the character of such sale as a 'close out sale'; provided further, that such alcoholic beverage is first offered to the manufacturer or vendor thereof

at the original invoice price at least ten days before it is offered for sale to the public;"

CERTIFICATES OF APPROVAL OR COMPLIANCE

Washington

"7306-23-F (2) No beer wholesaler nor beer importer shall purchase any beer not manufactured within the State of Washington by a brewer holding a license as a manufacturer of malt liquors from the State of Washington, and/or transport or cause the same to be transported into the State of Washington for resale therein, unless the brewer or manufacturer of such beer has obtained from the Washington State Liquor Control Board a certificate of approval, as hereinafter provided. The certificate of approval herein provided for shall not be granted unless and until such brewer or manufacturer of malt liquors shall have made a written agreement with the board to furnish the board, on or before the tenth day of each month, a report under oath, on a form to be prescribed by the board, showing the quantity of beer sold or delivered to each licensed beer importer during the preceding month, and shall further have agreed with the board, that such brewer or manufacturer of malt liquors and all general sales corporations or agencies maintained by it, and all trade representatives or agents of such brewer or manufacturer of malt liquors, and of such general sales corporations and agencies, shall and will faithfully comply with all laws of the State of Washington pertaining to the sale of intoxicating liquors and all rules and regulations of the Washington State Liquor Control Board. If any brewer or manufacturer of malt liquors shall, after obtaining such certificate, fail to submit such report, or if such brewer or manufacturer of malt liquors or general sales corporation or agency maintained by it,

or any representative or agent thereof, shall violate the terms of such agreement, the board shall, in its discretion, revoke such certificate."

California

"Rule 29. On and after July 1, 1941, no beer wholesaler nor beer importer shall purchase any beer not manufactured within the State of California by a manufacturer holding a license as a beer manufacturer from the State of California, or transport or cause the same to be transported into the State of California for resale therein, unless the manufacturer of such beer has obtained from the board and holds a valid unrevoked and unsuspended certificate of compliance. A certificate of compliance shall be granted when such manufacturer of beer shall have made a written agreement with the board to furnish to the board, on or before the fifteenth day of each month, a report under oath, on a form to be prescribed by the board, showing the quantity of beer sold or delivered by such manufacturer to each licensed beer importer in this State during the preceding month and shall further have agreed with the board, that such manufacturer of beer and all general sales corporations or agencies owned and maintained by it shall and will faithfully comply with all laws of the State of California pertaining to the sale of alcoholic beverages and all rules and regulations of the board. If any such manufacturer of beer shall, after obtaining such certificate, fail to submit such report, or if such manufacturer or general sales corporation or agency owned and maintained by it shall violate the terms of such agreement, the board may suspend or revoke the certificate of compliance in the manner provided by the Alcoholic Beverage Control Act for the suspension or revocation of licenses, and after a hearing which shall be held in the City of Sacramento

or in such other county seat in this State as the board determines to be convenient to the holder of the certificate. No fee shall be charged for such certificate of compliance. But same must be renewed annually on or before July 1st of each year hereafter."

Idaho

"Sec. 6(2). No wholesaler or dealer shall purchase in, or import into, the State of Idaho, any beer, whether manufactured within or without the State of Idaho, by anyone holding a license by the commissioner as a brewer of beer, or as a dealer, and/or transport or cause the same to be transported into or within the State of Idaho, for resale therein, unless the brewer or dealer of such beer has obtained from the commissioner a certificate of approval as herein-after provided. The certificate of approval herein provided for shall not be granted unless and until such brewer or dealer shall have made a written agreement with said commissioner to furnish to said commissioner on or before the fifteenth day of each month, a report, under oath, on a form to be prescribed by the commissioner, showing the quantity of beer sold by him within the State of Idaho during the preceding month, and shall have further agreed with said commissioner that such brewer or dealer, and all general sales corporations or agencies maintained by such brewer or dealer, and all trade representatives or agencies of such brewer or dealer, shall and will faithfully comply with all of the provisions of the laws of the State of Idaho relating to the regulation and control of the manufacture, sale and distribution of beer, and all rules and regulations adopted pursuant thereto. If any such brewer or dealer shall, after obtaining such certificate, fail to submit such report, or, if any such brewer or dealer, or any general sales corporation or agency maintained by such brewer or dealer, shall violate the terms of such agreement, the commis-

sioner shall give said brewer or dealer not less than fifteen days' notice, by registered mail, of such violation, and to appear before said commissioner and show cause, if any he has, why his certificate of approval should not be revoked, at which time the dealer or brewer may appear before the commissioner and introduce such evidence as he may have concerning said violation, and if said commissioner shall find, upon such hearing, that such brewer or dealer shall have violated any of the provisions of the Act, or any rules or regulations adopted pursuant thereto, he may in his discretion, and in addition to the other penalties herein described, revoke such certificate of approval, or he may suspend the same for a period of time not to exceed six months."

No. 10303

IN THE

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

WASHINGTON BREWERS INSTITUTE, ET AL
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee,

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE APPELLEE

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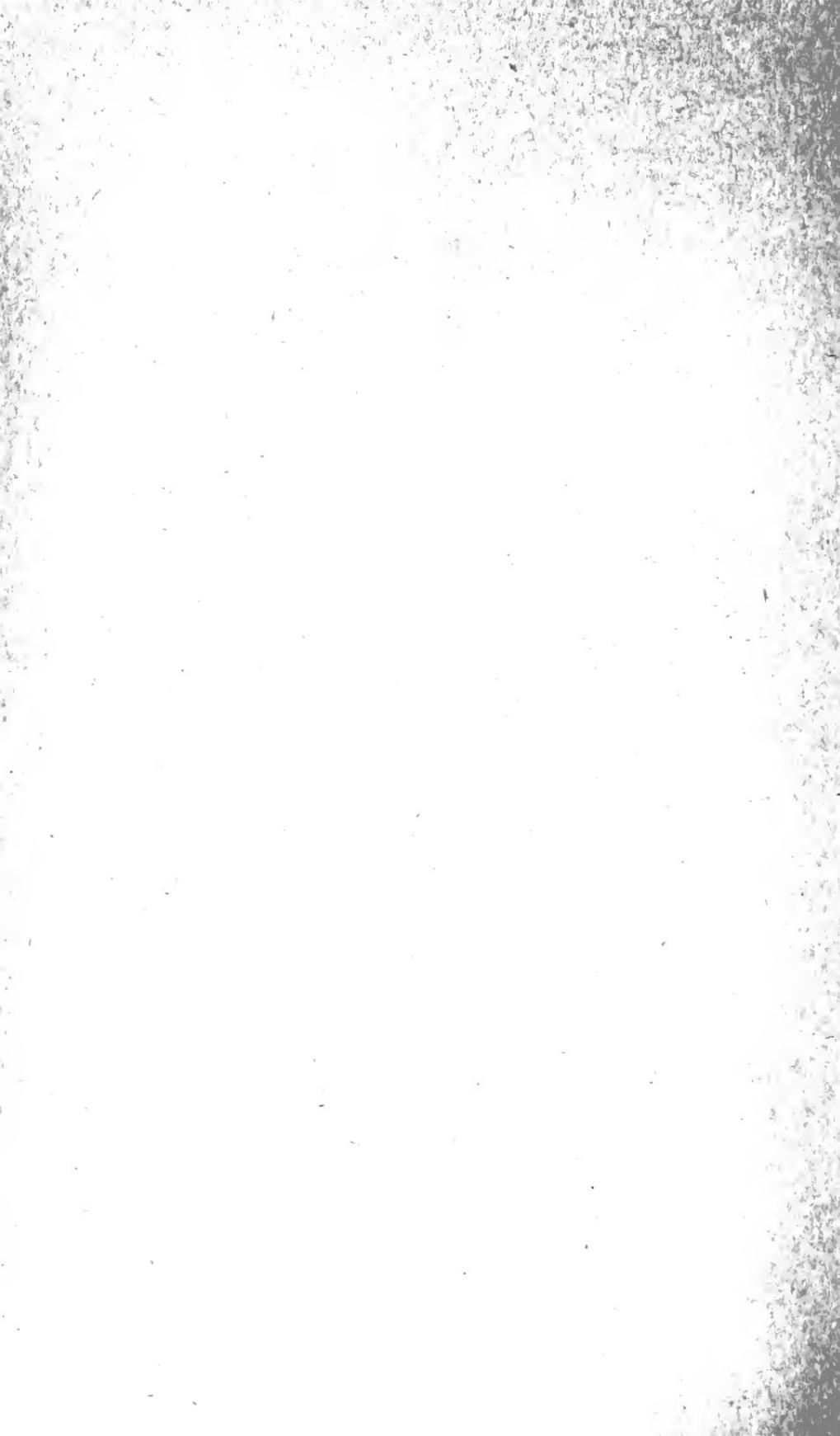
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CLERK



No. 10303

IN THE

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

WASHINGTON BREWERS INSTITUTE, ET AL
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee,

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE APPELLEE

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No. 10303

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BRIEF FOR THE APPELLEE

STATEMENT

This appeal arises from an indictment returned in May 1941 by a Grand Jury sitting in the Western District of Washington, Northern Division. Named as defendants in the indictment were (1) twenty corporations engaged in the manufacture, distribution and sale of beer; (2) four incorporated associations,

each composed of certain of the aforesaid corporations; and (3) thirty-two individuals, described in the indictment as being officers of the defendant corporations and the defendant associations.

The indictment (R. 6) contains two counts, the first charging a violation of Section 1 of the Sherman Act (26 Stat. 209, 15 U.S.C.A. Sec. 1) and the second charging a violation of Section 3 of that Act (15 U.S.C.A. Sec. 3). All the defendants interposed demurrers to the indictment based upon the contention that the facts stated did not constitute a violation of the Sherman Act and that the indictment was vague, uncertain and indefinite (R. 38). The demurrers were overruled by the District Court (R. 52). Thereupon appellants entered pleas of *nolo contendere* as to both counts of the indictment, and fines were imposed upon them by the Court (R. 58-132). In this appeal, the action of the District Court in overruling the demurrers to the indictment is assigned as error (R. 138).

SUMMARY OF THE INDICTMENT

Paragraph 1 of the indictment (R. 6) is a jurisdictional allegation that the acts charged were committed within three years prior to the date of the filing of the indictment by the Grand Jury. Para-

graphs 2-8, inclusive, define various terms employed in setting forth the charge. Included among these definitions (Par. 8) is a description of the "Pacific Coast Area" as the territories comprised within the states of Washington, California, Idaho and Oregon.

Paragraphs 9-14 name and describe the defendants.

Paragraph 15 alleges and describes the nature and extent of the trade and commerce involved. The commerce described therein is the sale and shipment of beer "by breweries having plants located within each of the states comprising the Pacific Coast Area to importers and distributors of such beer doing business in each of the other states comprising the said Pacific Coast Area for distribution and consumption therein".

Paragraph 16 is the charging portion of the indictment. It is there alleged that the defendants engaged in a combination and conspiracy to fix and maintain uniform, artificial and non-competitive prices for beer in sales in interstate commerce, as described in Paragraph 15.

Paragraph 17 consists of a further description of the alleged combination and conspiracy and sets forth in detail the methods alleged to have been agreed

upon and used by the defendants to effectuate the combination and conspiracy to fix prices. It is there alleged that the defendants sold beer in interstate commerce at prices and upon terms and conditions of sale which were fixed and agreed upon, and granted only such refunds and allowances for bottles and containers as were fixed and agreed upon (subsecs. b, c, d, e); that they required wholesalers and retailers to adhere to the prices and terms and the conditions of sale so agreed upon, and refused to sell to such wholesalers and retailers who failed to adhere to such prices and terms and conditions (subsecs. g, m); that they induced beer manufacturers located outside of the Pacific Coast Area to sell beer at the prices so agreed upon, and to withhold beer from wholesalers and retailers in the Area who failed to adhere to such prices (subsecs. n, o); that they caused the liquor control boards in the various states of the Pacific Coast Area to adopt regulations requiring that the sales prices of beer within each state be reported to and posted with the liquor control board of that state, so that such regulations could be utilized to effectuate the combination and conspiracy, and that they utilized the defendant associations as a clearing house for their prices, with the result that the prices published and posted with the various

liquor control boards were uniform and agreed upon (subsecs. i, j, k, l); that they employed persons to police the beer markets in order to secure adherence to the prices so fixed and agreed upon (subsec. f); that they agreed to repurchase distress beer from distributors in order to prevent its sale at prices lower than those fixed and agreed upon (subsec. h); that they organized the defendant associations and utilized them for the dissemination of statistical data and information in order to assist in effectuating the combination to fix prices (subsecs. a, p).

Paragraph 18 of the indictment alleges that the purpose and effect of the acts alleged were to fix the prices, terms and conditions of sale of beer sold in interstate commerce in the Pacific Coast Area and to prevent breweries located in states outside of the Area from selling beer therein except in compliance with the terms and conditions determined, fixed, and agreed upon by the defendants.

Count 2 of the indictment is substantially the same as Count 1, except that:

1. It refers to and alleges that the combination to fix prices of beer related to sales from defendants, located in the United States, to purchasers in the territory of Alaska; and

2. The allegations of paragraph 17 concerning liquor control boards and administrator's zones and price postings are omitted.

CONTENTIONS MADE BY APPELLANTS

In sum, five contentions are made by appellants. They are:

1. That the Twenty-first Amendment to the Constitution of the United States has deprived the Federal Government of any and all power under the Commerce Clause of the Constitution over trade and commerce in intoxicating liquors, and thus the Sherman Act, because it is grounded upon the Commerce Clause, is not applicable to interstate commerce in beer, the subject of the indictment.
2. That the Sherman Act is not applicable to the commerce involved in the combination charged in the indictment because of certain state laws existing in the states of the Pacific Coast Area.
3. That the indictment does not allege facts showing that interstate commerce has been directly affected.

4. That the indictment is defective because it does not allege that the states of the Pacific Coast Area have not passed legislation authorizing or requiring price fixing in the sale and distribution of beer.
5. That the facts alleged disclose simply a combination to comply with state laws and that a combination having such purpose is not violating the Sherman Act.

Three separate briefs have been filed by appellants. ¹ The Ivers Brief asserts and relies upon contentions numbered 1 and 2 above; the Armstrong Brief appears to rely upon contentions numbered 2 and 3 above; the Eisner Brief asserts and relies upon contentions numbered 2, 3, 4, and 5 above.

¹ The brief filed by Attorneys R. M. J. Armstrong and Albert M. Compodonico, of San Francisco, for appellants Regal Amber Brewing Company and William P. Baker will be referred to herein as the "Armstrong Brief".

The brief filed by Attorney Norman A. Eisner, of San Francisco, for appellants Acme Breweries and Karl F. Schuster will be referred to herein as the "Eisner Brief".

The brief filed by Attorneys Lenihan and Ivers, of Seattle, in behalf of all other appellants will be referred to herein as the "Ivers Brief".

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT DOES NOT DEPRIVE THE UNITED STATES OF THE POWER TO REGULATE INTERSTATE COMMERCE IN INTOXICATING LIQUOR WHEN SUCH COMMERCE IS CARRIED ON WITHOUT VIOLATION OF STATE LAWS.

A. THE UNITED STATES SUPREME COURT AND OTHER FEDERAL COURTS AFFIRM CONTINUING FEDERAL AUTHORITY OVER INTERSTATE COMMERCE IN LIQUOR.

Section 2 of the Twenty-first Amendment provides:

"The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The language of this Section does not apply in cases where transportation in intoxicating liquors is carried on without a violation of state laws. Had the framers of the Twenty-first Amendment intended to deprive Congress of power to regulate interstate commerce in liquors, the Amendment would most certainly have so stated. Instead, the application of the Amendment is expressly limited to "transportation or importation into any state . . . for delivery or use

therein . . . in violation of the laws thereof . . . ” It follows that the Commerce Clause, and acts passed thereunder, are applicable to commerce in liquors, except where their application would result in the transportation or importation of liquor into a state for use in violation of its laws.

This conclusion has been repeatedly approved and applied by the courts. *Arrow Distilleries, Inc. v. Alexander*, 109 F. (2d) 397 (C.C.A. 7, 1940), is a case in point. That case involved the Federal Alcohol Administration Act,² an act relating exclusively to intoxicating liquors and based on the Commerce Clause. Constitutionality of the Act was challenged, as in the case at bar, on the ground that the Twenty-first Amendment had divested the Federal Government of all jurisdiction over intoxicating liquors. The validity of the Act was upheld, the court speaking as follows (p. 400):

“ . . . there is no provision in the Amendment which purports to restrict the power of Congress over commerce in intoxicating liquors when such commerce is carried on without the violation of state laws, or to deny to Congress the power to legislate in aid of the state prohibitions.”

The Supreme Court denied certiorari (310 U.S.

² 49 Stat. 977, 27 U.S.C.A. Sec. 201, *et seq.*

646). Cf. *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F. (2d) 582 (C.C.A. 7, 1939).

In the *Arrow Distilleries* case, *supra*, the Court relied upon the decision of the Supreme Court of the United States in *Wm. Jameson, Inc. v. Morgenthau*, 307 U.S. 171. The *Jameson* case also involved the Federal Alcohol Administration Act, arising from a petition seeking to compel the Secretary of the Treasury to release certain liquor from customs, although it was admitted that the manner of labeling the liquor was in violation of the Act. The Supreme Court spoke as follows (p. 172-173):

“Here, the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence, that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention.”

The continuing applicability of the commerce clause to transportation of intoxicating liquors was likewise affirmed in *Hayes v. United States*, 112 F. (2d) 417 (C.C.A. 10, 1940). That case involved the Liquor Enforcement Act of 1936, which prohibits the transportation of intoxicating liquor into any state in which sales of liquor are prohibited.³ The action

was brought by the United States for forfeiture of certain liquor held in violation of the provisions of the Act. The respondent contended that the Act was unconstitutional because the Commerce Clause had been rendered inapplicable to intoxicating liquors by reason of the Twenty-first Amendment. The Court rejected this argument, speaking as follows (p. 422):

“While the Twenty-first Amendment surrendered to each state the power to prohibit or condition the importation of intoxicating liquor in interstate commerce thereinto, we do not regard it as a surrender of the power of Congress to prohibit or regulate the transportation of intoxicating liquor in interstate commerce. The language of the Twenty-first Amendment is prohibitory in character. We entertain no doubt that the Congress has the power to enact legis-

³ 49 Stat. 1928, 27 U.S.C.A. Secs. 221-228. Section 223 of the Act reads as follows:

“(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of in-

lation to execute the Amendment and penalize its violation."

The following cases are in accord, each of them affirming the continuing applicability of the Commerce Clause to interstate shipments of intoxicating liquor. *United States v. Colorado Wholesale Wine and Liquor Dealers Association*, 47 F. Supp. 160 (D.C. Colo. 1942); *California State Brewers Institute, et al v. International Brotherhood of Teamsters, etc., et al* (W.D. Wash., N.D. Equity No. 1184). See also, *Gregg v. United States*, 113 F. (2d) 687 (C.C.A. 8, 1940); *Hastings v. United States*, 115 F. (2d) 216 (C.C.A. 8, 1940); *Flippin v. United States*, 121 F. (2d) 742 (C.C.A. 8, 1941); *Schlitz Brewing Company v. Johnson*, 123 F. (2d) 1016 (C.C.A. 6, 1941); *Sancho v. Corona Brewing Co.*, 89 F. (2d) 479

toxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"(b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any State, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter and sections 388-390 of Title 18, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State."

(C.C.A. 1, 1937); *Dugan v. Bridges*, 16 F. Supp. 694, 717 (D.C.N.H. 1936); *Zukaitis v. Fitzgerald*, 18 F. Supp. 1000 (D.C. Mich. 1936).

In the *Colorado Liquor Dealers Association* case, *supra*, the Court upheld an indictment which, like the indictment in the case at bar, charged a combination among distributors of liquor to fix selling prices in violation of the Sherman Act. The Court considered and rejected the contention that the Twenty-first Amendment had rendered the Sherman Act inapplicable.

In the *California State Brewers* case, *supra*, several of the appellants, who in the case at bar deny the applicability of the Sherman Act, therein sought the Act's protection. They, and certain other manufacturers and distributors of beer, filed a bill in equity seeking to restrain a labor union and certain of its members from engaging in activities alleged by plaintiffs to be in restraint of their interstate commerce in beer. The case was heard by Judge Cushman and the injunction was granted. The Court filed conclusions of law, including a declaration that:

“The Twenty-first Amendment to the Constitution of the United States of America has not removed plaintiff's trade from the protection of the Antitrust Act.”

In the *Schlitz Brewing Company* case, *supra*, the

Circuit Court of Appeals for the Sixth Circuit upheld a complaint alleging a combination in restraint of trade and asking treble damages. Although the defendants contended that no restraint upon interstate commerce was alleged, they did not urge that the Twenty-first Amendment had removed intoxicating liquors from Federal jurisdiction under the Commerce Clause. Obviously, however, the decision of the Circuit Court was grounded upon the continuing applicability of that clause to commerce in liquors.

The cases relied upon by appellants (Ivers Brief, pp. 18-24) do not support the contention that the Twenty-first Amendment repealed the application of the Commerce Clause to intoxicating liquors. In the case of *State Board of Equalization v. Young's Market*, 299 U.S. 59 (Ivers Brief, p. 19) it was held that the State of California might properly enact a statute imposing a license fee for the privilege of importing beer into the State. The Supreme Court declared that since, under the Twenty-first Amendment a State could absolutely prohibit the importation of beer, it could also permit such importation under the conditions involved. In *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391, and in *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (Ivers Brief, p. 21) it was held that a state might prohibit the im-

portation of liquor from States which discriminated against its liquor products. In *Ziffrin, Inc. v. Reeves*, 308 U. S. 132 (Ivers Brief, p. 23) it was held that a state could require the licensing of common carriers engaged in transportation of liquor into or out of the state. The Court held that since it was within the power of the state to prohibit the manufacture or transportation of intoxicants the state might "adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect to them . . ." (p. 138). In *Mahoney v. Triner Corp.*, 305 U.S. 401 (Ivers Brief, p. 20) it was held that a state could prohibit the importation of liquor which did not bear a label registered in the Patent Office of the United States. Cf. *Duckworth v. Arkansas*, 314 U.S. 390.

All of the above cases arose from efforts to transport liquor into states in clear violation of state laws. Since, by the plain language of the Amendment, such transportation is prohibited, the validity of the state laws could not be denied by resort to the Commerce Clause. These cases do not hold, either expressly or by implication, that the Commerce Clause is inapplicable in cases where transportation of intoxicating liquors is carried on without a conflict with state legislation.

B. LEGISLATIVE HISTORY OF THE TWENTY-FIRST AMENDMENT INDICATES INTENT TO PRESERVE FEDERAL AUTHORITY OVER INTERSTATE COMMERCE IN LIQUOR.

It is urged by appellants (Ivers Brief, pp. 13-16) that the legislative history of the Amendment indicates that it was the intention of the framers to revoke the Commerce Clause of the Constitution insofar as intoxicating liquors are concerned. In support of this contention, appellants rely upon certain remarks made by individual Senators in the course of debates on the proposed Amendment. However, the plain language of the Amendment is more persuasive than isolated remarks made during the Senate debate. The rule is well established that where language is clear and unambiguous, it is controlling, without regard to expressions of opinion or attitudes of individual legislators made in the course of debate.⁴

Moreover, an examination of the legislative history of the Amendment fails to indicate that the purpose of the framers was to divest the Federal Government of jurisdiction under the Commerce Clause.

Much of the debate on the floor of the Senate related to a proposed section which was not included in the Amendment as submitted to the states for ratification. This section would have given Congress

⁴ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213.

"concurrent power to regulate or prohibit the sale of intoxicating liquor to be drunk where sold." (76 Cong. Rec. 1661). Serious opposition to this section was expressed principally because its operation would constitute an intrusion on the part of the Federal Government into purely local affairs of the states; and it was suggested that for this reason the proposed Amendment represented no improvement over the existing Eighteenth Amendment. One of the weaknesses of national prohibition was the fact that "it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits". (76 Cong. Rec. p. 4146) These views were repeatedly expressed from the floor of the Senate (76 Cong. Rec., pp 4138-4179) and clearly appear to have been the most prevalent grounds for the objection to the proposed Sub-section 3. As was said by Senator Wagner in the course of debate:

"It was a question of government; how to restore the constitutional balance of power in our Federal system which had been upset by national prohibition." (76 Cong. Rec. 4144)

The framers of the Amendment thus appear to have assumed the continued applicability of the Commerce Clause to intoxicating liquors. What they were concerned with was where to strike "the balance of

power" between state authority and federal authority.

The most significant thing about the debates on the floor of the Senate is that they reflect an intent to attain, by Section 2 of the Amendment, the same end that was sought by the enactment of the Webb-Kenyon Act.⁵ Prior to the passage of that Act, liquor transported in interstate commerce was protected by the Commerce Clause, and the prohibition states were thus unable to enforce adequately laws relating to liquor sale and distribution, when such laws prevented the free movement of liquor in interstate commerce. *Leisey v. Hardin*, 135 U.S. 100. The Webb-Kenyon Act gave effect to state liquor legislation by prohibiting the shipment or transportation of intoxicating liquors into any state for use in violation of state laws.⁶

⁵ Act of March 1, 1913, c. 90, 37 Stat. 699, 27 U.S.C.A. Sec. 122.

⁶ The Webb-Kenyon Act reads as follows:

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any for-

The Twenty-first Amendment "so clearly follows the Webb-Kenyon Act as to lead to the conclusion that it was copied therefrom and that it should receive the same construction as that given the last mentioned Act." *Dugan v. Bridges* 16 F. Supp. 694, 706 (D.C. N.H. 1936). See, also, 76 Cong. Rec. 4171.

In *Adams Express Company v. Kentucky*, 238 U.S. 190, it was held that the Webb-Kenyon Act did not prohibit the transportation of liquor into the State of Kentucky where the liquor was not to be used in violation of the laws of that State. The Supreme Court declared that the Act "did not assume to deal with all interstate commerce shipments of intoxicating liquor . . .", but that it related only to transportation of liquor in cases in which it was "to be dealt with in violation of the local law of the State" into which shipment is made. (238 U.S. 190, 198.) See,

eign country into any State, Territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. (Mar. 1, 1913, C. 90, 37 Stat. 699; Aug. 27, 1935, c. 740§ 202 (b) 49 Stat. 877).

also, *United States v. Colorado Wholesale Wine and Liquor Dealers Association*, 47 F. Supp. 160, 163 (D.C. Colo., 1942) Anno., 110 A.L.R. 931, 941. This construction of the Webb-Kenyon Act was fully established at the time of the drafting of the Twenty-first Amendment. It follows that the Congress which saw fit to adopt language closely following the language of the Webb-Kenyon Act, intended to adopt the contemporary construction of that Act as the true intendment of the Twenty-first Amendment.

The legislative history of the Twenty-first Amendment thus clearly indicates an intent to preserve Federal authority over interstate commerce in liquor.

If appellants' contention — that the Federal Government no longer has any jurisdiction over commerce in liquors — is accepted, it would mean that there is now *no governmental control*, either state or Federal, over commerce in liquors except where laws prohibiting or conditioning the importation of liquors have been enacted by state legislatures. All Federal laws based on the Commerce Clause which relate to

intoxicating liquors would have to be held unconstitutional, including the Federal Alcohol Administration Act,⁷ the Collier Act,⁸ and the Liquor Enforcement Act of 1936.⁹ Appellants' contention would require the overruling of United States Supreme Court and other Federal decisions which uphold the validity of these laws.

Likewise, acceptance of appellants' view would mean that the Federal Trade Commission Act,¹⁰ and the Securities Act of 1933,¹¹ depending for their validity on the Commerce Clause, must be held inapplicable to the vast and complicated liquor industry.

It is submitted that such consequences are not

⁷ 49 Stat. 977, 27 U.S.C.A. Sec. 201 *et seq.*

⁸ The Collier Act was a re-enactment of the Webb-Kenyon Act. 49 Stat. 877, 27 U.S.C.A. Sec. 122.

⁹ 49 Stat. 1928, 27 U.S.C.A. Sec. 221 *et seq.* The passage of such legislation, after the adoption of the Twenty-first Amendment, is a strong indication that the Amendment was not intended to divest the Federal Government of jurisdiction over liquors. *Myers v. United States*, 272 U. S. 52; *United States v. Moore*, 95 U. S. 760; *Williams v. United States*, 289 U. S. 553; *Levin v. United States*, 128 Fed. 826.

¹⁰ 49 Stat. 1527, 15 U.S.C.A. Sec. 41.

¹¹ 48 Stat. 74, 15 U.S.C.A. Sec. 77. This Act was enacted approximately four months after the adoption of the Joint Resolution calling for the Twenty-first Amendment, but no exemption was made in favor of firms or corporations engaged in the liquor industry.

warranted by the language of the Twenty-first Amendment. The language of the Amendment has no application whatsoever to commerce in liquor where such commerce is carried on without a violation of state laws; and in such cases the Commerce Clause, and laws based thereon, are applicable. This interpretation of the Amendment is supported by the decided cases. Furthermore, even where the transportation of intoxicating liquors is carried on in violation of state laws, Congress may enact legislation, such as the Webb-Kenyon Act and the Liquor Enforcement Act of 1936, which is in aid of the state prohibitions. Appellants' contention that the Twenty-first Amendment divested the Federal Government of jurisdiction over intoxicating liquors is, therefore, totally without merit.

II. THE LAWS OF THE STATES OF THE PACIFIC COAST AREA DO NOT AFFECT THE APPLICABILITY OF THE SHERMAN ACT IN THE INSTANT CASE.

A. STATE LEGISLATION RELATING IN A GENERAL WAY TO LIQUOR DISTRIBUTION DOES NOT DIVEST THE FEDERAL GOVERNMENT OF JURISDICTION OVER INTERSTATE COMMERCE IN INTOXICATING LIQUORS.

Appellants contend that upon the enactment by the states of the Pacific Coast Area of "general" legislation concerning the distribution of intoxicating

liquors, the Federal Government was thereupon divested of all jurisdiction, under the Commerce Clause, over commerce in liquors. To support this contention, appellants argue (Ivers Brief, p. 32, et seq.) that the Twenty-first Amendment is an "offer" to the states which, when acted upon, automatically withdraws the application of the Commerce Clause as to intoxicating liquors.

It is not necessary to go beyond the *Jameson Case*, *supra*,¹² to defeat this contention. In that case, the Government sought to exercise jurisdiction over the importation of liquor into the State of New York, where comprehensive state legislation relating to liquor had been enacted. The Supreme Court said it saw "no substance" to the contention that the Amendment had divested the Federal Government of its power to regulate commerce in liquor (307 U. S. 171, 173).

In the *Arrow Distilleries Case*, *supra*,¹³ the applicability of the Federal Alcohol Administration Act was upheld, although the liquor involved in the proceedings was "to be used in violation of the laws of Iowa". (p. 403.)

In the *Colorado Liquor Dealers Case*, *supra*,¹⁴ the

¹² 307 U. S. 171, 173.

Sherman Act was held applicable to the interstate shipments of liquor into the State of Colorado, although that State had passed legislation relating to intoxicants. The same Act was held applicable in the *California State Brewers Case*, *supra*,¹⁵ to shipments into the State of Washington, although the state legislation relied upon the appellants herein had already been enacted. See also *Schlitz Brewing Company v. Johnson*, 123 F. (2d) 1016 (C.C.A. 6, 1941).

The Webb-Kenyon Act¹⁶ and the Liquor Enforcement Act of 1936¹⁷ are based on the Commerce Clause of the Constitution and *depend for their applicability upon the existence of state legislation*. *Hayes v. United States*, 112 F. (2d) 417 (C.C.A. 10, 1940). Obviously, a decision to the effect that Federal jurisdiction over commerce in liquor is automatically withdrawn by the enactment of state liquor legislation would amount to a denial of the constitutionality of these acts.

¹³ 109 F. (2d) 397 (C.C.A. 7, 1940), c.d. 310 U. S. 646.

¹⁴ 47 Fed. Supp. 160 (D.C. Colo 1942).

¹⁵ W.D. Wash., N.D., Equity No. 1184.

¹⁶ 49 Stat. 877, 27 U.S.C.A. Sec. 122.

¹⁷ 49 Stat. 1928, 27 U.S.C.A. Sec. 224.

The Armstrong Brief and the Eisner Brief support the contention that general state legislation divests the Federal Government of jurisdiction over intoxicating liquors by citation of a number of cases which hold simply that the Commerce Clause does not afford protection to liquor which is sought to be transported into a state in violation of its laws. (Armstrong Brief, pp. 28-36; Eisner Brief, pp. 9-15) Such cases, it is submitted, furnish no support whatsoever for the proposition that the Commerce Clause is inapplicable to commerce in intoxicating liquors which is carried on without violation of state laws.

In the Ivers Brief (pp. 34-37) it is argued that the Twenty-first Amendment is an affirmative grant of power to the states, and that any jurisdiction over commerce in intoxicating liquors which remains in the Federal Government is an implied power, which is removed upon the enactment by states of general liquor laws. This argument is based on several assumptions, none of which are correct. Neither the Eighteenth Amendment nor the Twenty-first Amendment divested the Federal Government of jurisdiction over interstate commerce in liquors, and such jurisdiction is based directly on the Commerce Clause. *United States v. Hill*, 248 U.S. 420; *Wm. Jameson, Inc. v. Morgenthau*, 307 U.S. 171. Furthermore, the Twen-

ty-first Amendment did not constitute an affirmative grant of power to the states. State power over intoxicating liquors is derived from the fundamental police power of the states. *Sancho v. Corona Brewing Corp.*, 89 F. (2d) 479 (C.C.A. 1, 1937), c.d. 302 U.S. 699; Cf. *Bacardi Corp. v. Domenech*, 311 U.S. 150. The Twenty-first Amendment is "prohibitory in character" and was not a "surrender of the power of Congress to prohibit or regulate the transportation of intoxicating liquor in interstate commerce". *Hayes v. United States*, 112 F. (2d) 417, 422 (C.C.A. 10, 1940).

In the Ivers Brief it is apparently recognized that Federal laws based on the Commerce Clause are applicable to commerce in intoxicating liquors in cases where their application would not result in the transportation of liquor into a state in violation of its laws — for the brief argues at some length that the *philosophy* of the Sherman Act is in conflict with that of state liquor laws (Ivers Brief, p. 39).

The state laws relied upon by appellants in this connection do no more than prohibit certain *types* of competition. They prohibit price discrimination, they regulate advertising, and they require that beer prices be posted with state agencies. In the field of Federal

¹⁸ 49 Stat. 1527, 15 U.S.C.A. Sec. 21(a).

discrimination; the Federal Trade Commission Act¹⁹ regulates advertising; and the Interstate Commerce Act²⁰ requires railroads to publish their rates with the Interstate Commerce Commission. While some economic theorists might argue that the philosophy of these acts is in conflict with that of the Sherman Act, such conflict, if it exists, is certainly not grounds for repealing the Sherman Act. The fact is that the Sherman Act is itself a regulatory enactment, declaring that distribution of commodities shall be in accordance with competitive principles. Certainly, however, the existence of statutes which eliminate certain abuses in the competitive system cannot be held to have repealed the Sherman Act. Appellants' argument assumes that there can be no such thing as a form of regulated competition. Yet such a scheme of distribution has existed in this country for many years. There is no conflict between any state law relied upon by appellants and the Sherman Act which requires that one must fall before the other.

A further answer to appellants' argument is to be found in the Armstrong Brief, where it is pointed out (p. 38) that all the states in the Area have "adopted laws against restraint of trade and commerce" legislation the Robinson-Patman Act¹⁸ prohibits price

¹⁹ 38 Stat. 719, 15 U.S.C.A. Secs. 41, 44.

²⁰ 48 Stat. 219, 49 U.S.C.A. Sec. 5.

which are applicable to the distribution of beer. In other words, the state laws require competition. Thus, there is no conflict, even in economic philosophy, between the Sherman Act and state legislation relating to beer.

It is submitted that the so-called "general" liquor legislation enacted by the states of the Pacific Coast Area has in no way affected the applicability of the Sherman Act.

B. COMPLIANCE WITH THE SHERMAN ACT IN THE DISTRIBUTION OF BEER IN THE PACIFIC COAST AREA WOULD NOT VIOLATE ANY LAW OF ANY STATE IN THE AREA.

Appellants, apparently recognizing the weakness of the argument that "general" legislation by the state impairs the applicability of the Sherman Act, go one step further and argue that the four states of the Area have enacted legislation which "specifically" deals with the acts alleged in the indictment (Ivers Brief, p. 40). They argue that each of the states involved "has enacted, by legislative act or regulation pursuant thereto, provisions controlling prices, the fixing of prices . . . and other matters relative thereto" (Ivers Brief, p. 40). It is declared that the Washington State Liquor Control Board "has defined and

established zones for the purpose of fixing and establishing prices . . ." (Ivers Brief, pp. 40-41).

Surely appellants do not mean by this that the State of Washington or its Liquor Control Board fixes or controls the sales price of beer. There is no law or regulation in that state or in any other state of the Area which has this purpose or effect. Furthermore, there is no law or regulation operative in any of the four states of the Area which permits, authorizes, or requires beer distributors to engage in joint price agreements.

Appellants point out that regulations in each of the states of the Area provide that each brewer and importer must publish and file its selling price with the state agency in which sales of this beer are to be made, and that they must adhere to the price so filed (Ivers Brief, p. 40-41). Such requirements do not, by any possible interpretation, authorize distributors to agree on the prices to be filed thereunder.²¹

Appellants likewise point to the regulations which prohibit a brewer from making price discriminations between purchasers located in common trade areas. Such regulation has a purpose similar to the

²¹ The requirement that railroads must publish a list of their rates with the Interstate Commerce Commission does not authorize inter-company price agreements. *Keogh v. Chi. N. W. Ry.*, 260 U.S. 156.

provisions of the Federal Act which prohibits price discriminations in sales in interstate commerce.²² Obviously, neither these state regulations nor the provisions of the Federal Act were intended to permit agreements among competitors to fix selling prices. Likewise, regulations prohibiting price discriminations among purchasers of a common "classification" do not permit agreements among distributors upon the price to be charged the members of such classification (Ivers Brief, pp. 43-44).

The fact that a manufacturer is permitted to fix the price at which purchasers from him may resell a product does not permit a group of manufacturers to agree upon the price at which all purchasers from them are to make resales (Ivers Brief, pp. 44-45). The fact that a certain procedure is to be followed in connection with the purchase by a manufacturer of a distress product does not permit agreement among the competitors to withdraw a portion of the commodity from the market in order to fix or stabilize prices. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150 (Ivers Brief, pp. 45-46). Similarly, the fact that manufacturers located outside of a state must obtain a certificate in order to do business within that state does not permit such a manufacturer to

²² 49 Stat. 1527, 15 U.S.C.A. Sec. 21(a).

engage with its local competitors in price-fixing combinations (Ivers Brief, pp. 46-47).

It is apparent that appellants can point to no state legislation or regulation which requires or authorizes beer distributors to combine to fix the prices at which beer will be sold. Appellants certainly cannot contend that they would have violated a single state law or regulation if they had *not* engaged in the price-fixing combination alleged in the indictment. This fact alone confirms the validity of this indictment. It is true that certain of the steps, or the means, which the appellants adopted to fix and stabilize beer prices were authorized or required by state law or regulation; but if, as alleged, these steps are part of a plan adopted by appellants to fix and stabilize prices, the fact that the steps themselves are lawful does not alter the illegality of the plan. *Swift & Co. v. United States*, 196 U.S. 375, 396.

The fact is that the laws of the states concerned contemplate competition in the distribution of beer. The California liquor law speaks of "competing prices"²³ and of a "beverage which is in fair and open competition with alcoholic beverages of the same gen-

²³ Calif., Ch. 330, L. 1935, amd. Ch. 758, L. 1937, Sec. 38(e).

eral class".²⁴ Likewise, the California State Constitution, in defining its powers over liquor, specifically states that they are "subject to the laws of the United States regulating commerce between foreign nations and among the states".²⁵

Similarly, the fact that the state regulations require that prices be published with state agencies a certain number of days before they are to become effective indicates that price competition is expected. If the state laws and regulations intended that beer manufacturers should agree upon the prices to be posted, there would be no purpose in establishing a hiatus between the time of filing prices and the time they are to be effective.

No law or regulation of any state in the Pacific Coast Area requires, permits, authorizes, or condones a combination among distributors of beer to fix selling prices. In fact, such combinations would be in violation of the state laws prohibiting restraints of trade. Since distribution of beer in the Pacific Coast Area at competitive prices would not violate any law or regulation of any state in the Area, and since distribution in such manner is therefore not prohibited

²⁴ Calif. Ch. 330 L. 1935, amd. Ch. 758, L. 1937, Sec. 555(a).

²⁵ Calif. Const. Art. 22, Sec. 22 (Nov. 6, 1934).

by the Twenty-first Amendment, it follows that the Sherman Act is applicable in the case at bar.

III. THE INDICTMENT SUFFICIENTLY ALLEGES A RESTRAINT WHICH DIRECTLY AFFECTS INTERSTATE COMMERCE.

Appellants contend that distribution of beer in the Pacific Coast States "under the facts alleged in the indictment . . . would constitute a violation of the Webb-Kenyon Act . . ." (Armstrong Brief, p. 39). Appellants therefore conclude that the indictment does not allege a restraint of interstate commerce. Presumably, their reasoning is that the distribution of beer at prices which are fixed by agreement violates the provisions of the state laws prohibiting restraints of trade; and that since distribution of liquor in violation of state laws is prohibited by the Webb-Kenyon Act, such distribution does not constitute interstate commerce.

This argument rests on a curious inconsistency. It is founded on the Webb-Kenyon Act and yet that Act is itself based on the Commerce Clause and, by its very terms, is applicable only in cases where liquor is transported into a state for distribution in violation of state laws. *Adams Express Co. v. Kentucky*, 238 U.S. 190. The very application of the Webb-Kenyon Act establishes that Congress is not divested of jurisdiction over liquors simply because of the fact

that they may be in the course of transportation into a state for distribution in violation of state laws. While the Commerce Clause may not be resorted to protect liquor transportation into a state in violation of state laws, nevertheless, Congress retains power under the Commerce Clause "to legislate in aid of state prohibitions." *Arrow Distilleries, Inc. v. Alexander*, 109 F. (2d) 397, 400 (C.C.A. 7, 1940); *United States v. Hill*, 248 U.S. 420. Appellants' argument amounts to nothing more than an admission that they have violated the Webb-Kenyon Act as well as the Sherman Act; and since the Webb-Kenyon Act rests upon the applicability of the Commerce Clause, it can hardly be said that this Act can afford grounds for denying the existence of interstate commerce under the facts alleged in the indictment.

Appellants likewise contend that the indictment does not allege a restraint upon interstate commerce because of the application of the Wilson Act.²⁶ (Armstrong Brief, p. 40). The Wilson Act, however, does not, either by its terms or by its application, divest

²⁶ 26 Stat. 313, 27 U.S.C.A. Sec. 121. The Act reads:

"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the

intoxicating liquors of their interstate character, at any point in the flow of commerce. No act of Congress could do this. All that the Wilson Act does is provide that at a certain point state laws respecting liquor shall become applicable. It does not deny the applicability of Federal laws which are not in conflict with state laws.

But even if the Wilson Act did purport to render intrastate that which in fact is interstate, appellants' contention would be without merit, for the Wilson Act is not applicable to the facts charged in the indictment. The indictment alleges that the defendants combined to fix prices in sales from manufacturers located in one state to purchasers located in another (Indictment, par. 15). The Wilson Act is not applicable to such commerce. It is applicable only after the goods have reached the consignee in the state of destination. It is *not* applicable while the goods are in the course of transportation or shipment from one state to another. *In re Rahrer*, 140 U.S. 545; *Rhodes v. Iowa*, 170 U.S. 412. Furthermore, even if the subject matter of the indictment had

laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

reached the state of destination, and the interstate flow had ceased, this would furnish no grounds for challenging the indictment, for a determination of the point where interstate commerce ends is not essential in determining whether interstate commerce is affected within the meaning of the Sherman Act. *Local 167 v. United States*, 291 U.S. 293, 297; *United States v. General Motors Corp.*, 121 F. (2d) 376, 398, 401, 402 (C.C.A. 7, 1941).

Clearly, the indictment alleges facts amounting to a restraint upon interstate commerce in beer.

IV. THE INDICTMENT NEED NOT ALLEGE THE ABSENCE OF STATE LAWS WHICH MIGHT BE SET UP BY WAY OF DEFENSE.

It is contended by appellants that the indictment is defective because it does not allege that "the acts complained of are not authorized or required by state laws." (Eisner Brief, p. 18).

The indictment need not contain any such allegation. The law in this respect is stated in 27 Am. Jur. 668, as follows:

"Nor is an indictment which clearly and accurately describes every ingredient of an offense defined by a statute which contains no exception or proviso defective or insufficient for want of averments in negation of the provisions of another statute which may be set up defensively

or of an exception in the latter statute."

The above rule was applied by the Supreme Court in the case of *United States v. Hutcheson*, 312 U.S. 219. In that case the defendants were indicted for a violation of the Sherman Act, and contended, on demurrer, that the acts alleged in the indictment did not constitute an offense under the Sherman Act by reason of certain provisions contained in the Norris-LaGuardia Act. The indictment did not negate the existence of the Norris-LaGuardia Act. The Supreme Court held that it could properly consider the Norris-LaGuardia Act in determining whether or not the facts alleged in the indictment constituted a violation of the Sherman Act, or any other Act, saying (p. 229):

"In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams v. United States*, 168 U.S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations."

Obviously, if the prosecution in this case were required to allege the absence of state laws, it would

[1]
be necessary to prove such absence. The manner of proving the absence of such a state law would indeed be interesting.

It is submitted that the indictment contains all necessary allegations.

V THE INDICTMENT CHARGES A VIOLATION OF THE SHERMAN ACT AND NOT SIMPLY A COMBINATION TO COMPLY WITH STATE LAWS.

It is contended in the Eisner Brief (p. 21) that the indictment does not charge a violation of the Sherman Act because all that is alleged is a combination "the object and purpose of which is compliance with state laws and regulations . . ."

The indictment charges a combination among themselves of beer to fix the prices at which they will sell this commodity. Such a combination is a violation of the Sherman Act (see the United States v. Standard Oil Co., 205 U.S. 101). An application of this rule can apply to the case at bar because the import laws of the states of the Pacific Coast three member require permit a source of income combination to fix the domestic price of beer. The law in so far provided for in the Almoning Brief (p. 39-40) that the state laws prohibiting restriction of trade require that transportation of beer shall be at

accordance with the principles of competition. Little support, therefore, can be found in the state legislation for the argument that the purpose and object of the alleged combination was to comply with state laws.

The fact that some of the steps utilized by appellants to effectuate the object of the combination and conspiracy are legal, cannot, of course, afford any grounds for challenging the validity of the indictment. *Swift & Co. v. United States*, 196 U.S. 375.

VI. COUNT TWO OF THE INDICTMENT ADEQUATELY ALLEGES A VIOLATION OF SECTION THREE OF THE SHERMAN ACT.

Count Two of the indictment alleges that the defendants named in the indictment combined to fix the prices of beer in sales from manufacturers located in states of the United States to purchasers located in the Territory of Alaska.

The argument made heretofore, with respect to Count One of the indictment, applies equally to the allegations of Count Two. The Territory of Alaska has enacted no laws and promulgated no regulations which require, permit, or authorize distributors located in the states of the United States to agree among themselves with respect to prices of beer sold to purchasers in the Territory of Alaska. The distribu-

tion of beer in compliance with the provisions of the Sherman Act is not therefore prohibited, and the Twenty-first Amendment to the Constitution has no application. Furthermore, the laws of the Territory of Alaska do not relate either "generally" or "specifically" to the facts alleged in the indictment which constitute the charge. No argument can be made to the effect that the Territory of Alaska has pre-empted the field of liquor legislation, if it be assumed that such argument affords valid ground for challenging the indictment in the case at bar.

CONCLUSION

It is submitted that the foregoing authorities adequately establish that the Twenty-first Amendment did not divest the Federal Government of jurisdiction over intoxicating liquors under the Commerce Clause. The Twenty-first Amendment is prohibitory only. Its only effect upon the Commerce Clause is that it prohibits resort to that clause for protection of transportation of liquor into a state in violation of state laws. In other cases, the Commerce Clause, and laws based thereon, are applicable. Congress has the power, with respect to liquor, to enact legislation in aid of state laws and legislation which does not conflict with state laws respecting the use or distribution of liquor.

No state in the Pacific Coast Area, nor the Territory of Alaska, requires, authorizes, or permits distributors of beer to engage in combinations to fix and agree upon the selling prices of beer. Consequently, the distribution and sale of beer in the Pacific Coast Area and in Alaska in compliance with the provisions of the Sherman Act does not violate any law of any state in the Area, or any law of the Territory of Alaska. The Twenty-first Amendment is therefore inapplicable, and the applicability of the

Commerce Clause and the Sherman Act are unqualified.

This conclusion is supported by the fact that the four states of the Area have laws prohibiting restraints of trade which require that beer be distributed at prices which are fixed by competition. Instead of being in conflict with state legislation, as some of appellants would imply, the Sherman Act is actually in aid of state legislation.

It is therefore submitted that the demurrs to the indictment were properly overruled, both as to Count One and as to Count Two.

Respectfully submitted,

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No. 10,303

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**United States Circuit Court of Appeals
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AMBER BREWING COMPANY, WILLIAM
P. BAKER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Western District of Washington, Northern Division.

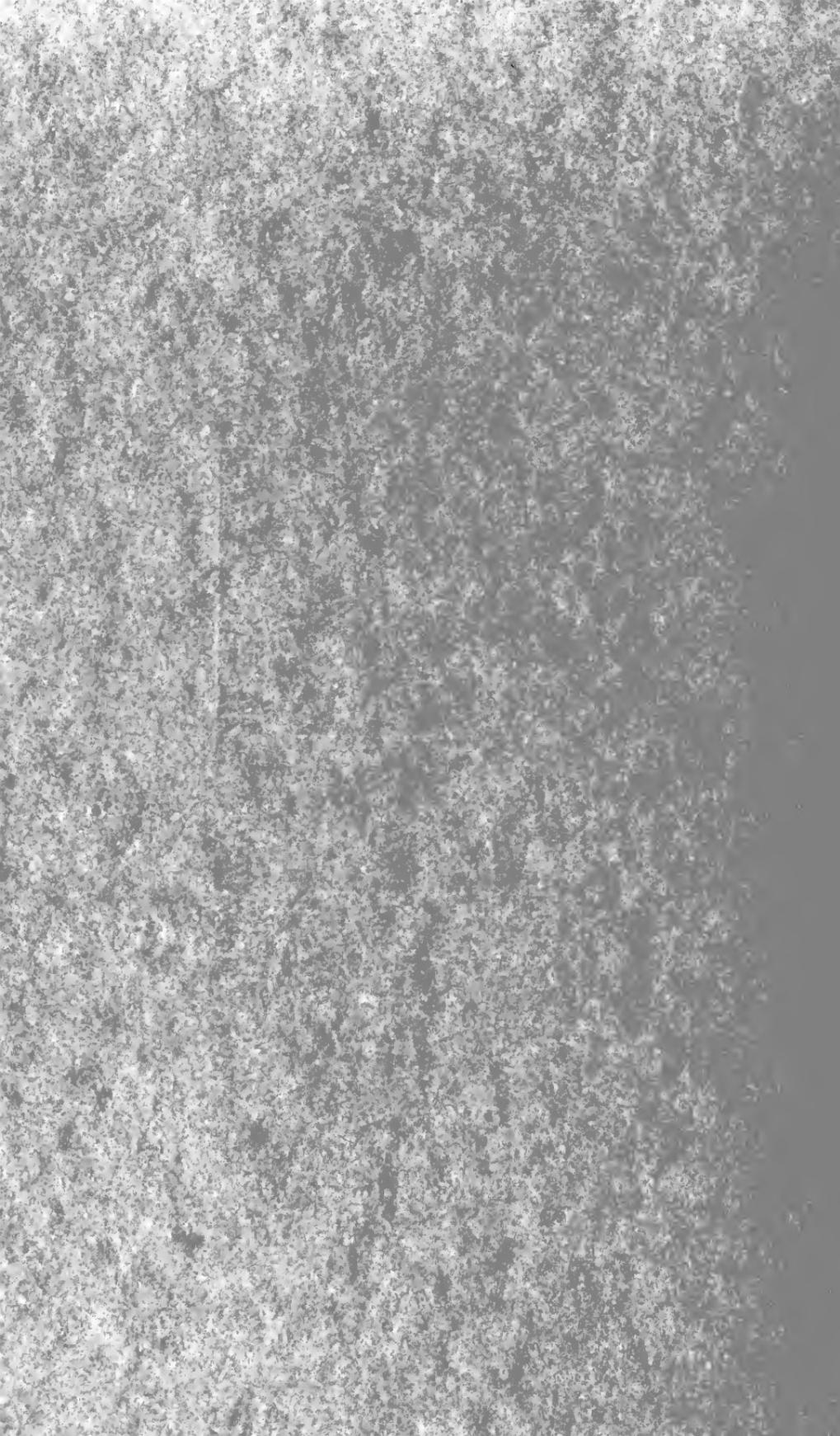
**CLOSING BRIEF FOR APPELLANTS,
REGAL AMBER BREWING COMPANY AND WILLIAM P. BAKER.**

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Western District of Washington, Northern Division.

**CLOSING BRIEF FOR APPELLANTS,
REGAL AMBER BREWING COMPANY AND WILLIAM P. BAKER.**

The appellants, Regal Amber Brewing Company and William P. Baker, submit this as their closing brief of the argument in support of their appeal.

RESTATEMENT OF THE QUESTION INVOLVED.

The appellee's brief sums up the contention of these appellants (Appellee's Brief p. 6) as follows:

"2. That the Sherman Act is not applicable to the commerce involved in the combination charged

in the indictment because of certain state laws existing in the states of the Pacific Coast Area."

"3. That the indictment does not allege facts showing that interstate commerce has been directly affected."

The foregoing is not wholly correct and to clarify our position we restate that the contention of these appellants is, that intoxicating liquors, even when moving in interstate commerce, *under the facts stated in the indictment*, are no longer subject to the power of the federal government *with reference to the matters charged in the indictment*.

The appellee does not appear to question the proposition stated in our opening brief (p. 7) :

"It is well settled, therefore, that if the subject matter of the alleged conspiracy, *does not relate to and act upon* interstate commerce, then it is *not* within the terms of the Sherman Act."

It is our contention that the conspiracy and acts charged in the instant indictment relate to the *sale and distribution of a commodity which must, as a matter of law, be treated like articles in intrastate commerce*, not like articles of interstate commerce; that by reason of the Twenty-first Amendment to the Constitution of the United States, and by reason of the laws of Congress, notably the Webb-Kenyon Act and the Wilson Act, heretofore cited and quoted in our opening brief, the subject matter of the alleged conspiracy is subject to the laws of the respective states. The alleged conspiracy is to be tested as to its legality only by those state laws, since the alleged conspiracy does not act

upon and embrace interstate commerce. In this respect the traffic in intoxicating liquors is distinct from trade and commerce in all other commodities, because other commodities have not been dealt with by the Constitution and by Congress in the same manner.

REPLY TO APPELLEE'S ARGUMENT.

These appellants will not attempt to reply to all of the points raised by appellee but only to those that seem to attempt to answer questions raised by these appellants in their opening brief. The remaining points will, without doubt, be capably and convincingly answered by the other appellants herein.

POINT I OF APPELLEE'S ARGUMENT IS NOT AN ACCURATE OR TRUE STATEMENT OF THE LAW.

POINT I OF APPELLEE'S ARGUMENT STATES (Brief p. 8) THAT "THE TWENTY-FIRST AMENDMENT DOES NOT DEPRIVE THE UNITED STATES OF THE POWER TO REGULATE INTERSTATE COMMERCE IN INTOXICATING LIQUOR WHEN SUCH COMMERCE IS CARRIED ON WITHOUT VIOLATION OF STATE LAWS".

The foregoing is the major premise upon which appellee's argument is based. Unless the Federal Government and the States have concurrent power to regulate or prohibit the sale of intoxicating liquors, the major premise of appellee falls and with it its entire case.

When the proposed constitutional amendment was introduced in Congress it contained three sections.

Sections 1 and 2 are now Sections 1 and 2 of the Twenty-first Amendment. The proposed Section 3 provided:

“Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquor to be drunk on the premises where sold.”

In the consideration of the proposed amendment much of the debate in the Senate and in the House was devoted to this Section 3. It was contended that Section 3 was inconsistent with Section 2. As expressed by Senator Blaine, who was in charge of the bill in the Senate:

“The purpose of Section 2 is *to restore to States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States* * * * My view therefore is that Section 3 is inconsistent with Section 2, and the two Sections are incompatible and that Section 3 ought to be taken out of the resolution.” (Italics ours.)

76 Cong. Rec. 4143.

The entire subject of congressional debates on the amendment resolution are discussed later in this brief, but we feel that what is said here, while not controlling in construing a constitutional amendment, does indicate the “temper of the times” and to some extent the object to be attained upon adoption of the amendment.

Section 3 of the proposed amendment was stricken from the resolution and the amendment was submitted in the form in which it was adopted and now con-

stitutes the Twenty-first Amendment to the Constitution.

The Wilson Act (26 Stat. 1890, p. 313; 27 U. S. C. A. Section 121) was entitled "An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases". It provided that intoxicating liquors transported into any state or territory or remaining therein for use, consumption, sale or storage therein,

"shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in like manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The Wilson Act was supplemented by the Webb-Kenyon Act (37 Stats. 1913, p. 699; 27 U. S. C. A. Section 122). This latter act was entitled "An Act divesting intoxicating liquors of their interstate character in certain cases".

It provides that the shipment or transportation of any intoxicating liquor from one state or territory to another, or from a foreign country, which is intended by any person interested therein to be received, possessed, sold or used in violation of any law of such state or territory, is prohibited.

The Twenty-first Amendment to the Constitution settled the questionable constitutionality of the Webb-Kenyon Act and gave it sanction.

How, under the foregoing, can the Sherman Act, as claimed by appellee, be said to act upon a commodity which the law has particularly and definitely declared to be a domestic product.

In *James Clark Distilling Company v. Western Maryland R. Co.* (1916), 242 U. S. 311, 61 L. Ed. 326, the Court said (at p. 325) :

“The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state having been in express terms devested by the Webb-Kenyon Act of their interstate commerce character, * * * there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the constitution.”

These appellants have never contended that the Twenty-first Amendment of the Constitution divested the federal government of all power of control over intoxicating liquors moving in interstate commerce, but we do contend that intoxicating liquors, even when moving in interstate commerce, under the facts stated in the indictment herein, are no longer subject to the power of the federal government, with reference to the matters charged in the indictment, and this contention we believe we have conclusively maintained in our opening brief.

THE UNITED STATES SUPREME COURT AND OTHER FEDERAL COURTS DO AFFIRM CONTINUING AUTHORITY OVER INTERSTATE COMMERCE IN LIQUOR, BUT APPELLEE QUOTES NO DECISION THAT SUPPORTS THE INSTANT INDICTMENT.

The first clause of the foregoing paragraph is appellee's subheading A.

We do not feel that this heading requires extended discussion.

Appellee quotes the case of *Arrow Distilleries Inc. v. Alexander*, 109 F. (2d) 397.

In this case, the right of Congress to require a permit of one engaging in rectifying, distilling and bottling alcoholic liquors in *interstate trade* was upheld.

What support can that case give to the appellee's position in the instant case? Or how can it in any way controvert these appellants' contentions as to the applicability of the Sherman Act to the facts charged in the instant indictment.

The case of *Wm. Jameson Inc. v. Morgenthau*, 307 U. S. 171, is also cited and quoted from by appellee in support of the point now under discussion. (Appellee's brief p. 10.)

This case involved a shipment of alcoholic beverages from a foreign country to the United States and its entrance opposed upon the ground that it violated the labeling provisions of the Federal Alcohol Administration Act (27 U. S. C. A. Section 205). The importer contended that Twenty-first Amendment to the Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause. As this question was one dealing entirely with *foreign commerce* and did not in any way involve importation into any state the Supreme Court correctly stated, "We see no substance in this contention".

We are at a loss to understand the relevancy of this citation to the question at issue in the instant case. It seems to us that the issue raised in the *Jameson* case was silly because it is plain that the Twenty-first Amendment was not intended to and did not affect federal control over importations into its borders from foreign countries under the provisions of the commerce clause of the U. S. Constitution "To regulate commerce with foreign nations * * *". What that amendment did modify was the portion of the same section of the Constitution "To regulate commerce * * * among the several states". (U. S. Const., Art. I, Sec. 8, Clause 3.)

The case of *Hayes v. U. S.* cited and quoted from (Appellee's brief p. 10) add nothing to the strength of appellee's contention under this head. It simply held that Congress "has the power to enact legislation to execute the Amendment (21st Amendment) and penalize its violation". (Quotation from Appellee's brief p. 11.)

LEGISLATIVE HISTORY OF TWENTY-FIRST AMENDMENT.

Under subdivision B of Point I of appellee's brief (p. 16) is the heading:

"B. Legislative History of the Twenty-first Amendment Indicates Intent to Preserve Federal Authority Over Interstate Commerce in Liquor."

This portion of appellee's brief is not addressed to anything contained in our opening brief but we believe it merits at least passing attention and we must

also give particular attention to matter appearing under this heading which is pertinent, perhaps, to the general discussion but has no relation to the subject heading of this portion of appellee's brief. We refer here to matter appearing on pages 20 to 22 of appellee's brief.

First, as to the discussion of the proposed amendment in the United States Senate.

In the Court below the appellee first raised this question of legislative intent and we fully discussed it there. But we were puzzled then and we are now at the appellee's object in raising the question when an examination of the Senate discussion, as appears in the files of the 76th Congressional Record, shows conclusively that the intent of that body was to take federal government out of any control, other than enforcement of the amendment, of the traffic in intoxicating liquors.

Reluctantly we feel it necessary to repeat here a brief outline of the discussion before the United States Senate.

The Twenty-first Amendment was before Congress as Senate Joint Resolution No. 211. Senator Blaine was in charge of this resolution. The resolution was referred to the Committee on Judiciary of which Senator Blaine was a member.

The committee revised the resolution and reported favorably. (76 Cong. Rec. 1621.) The report contained no discussion. Senator Blaine made an oral committee report to the Senate.

Senator Blaine first gave a history of legislation enacted prior to the adoption of the Eighteenth Amendment, which was designed to increase state power over alcoholic beverage control. He then stated (76 Cong. Rec. 4141) :

“So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

Mr. President, the pending proposal will give the States that guarantee. When our Government was organized and adopted, *the States surrendered control over and regulation of interstate commerce.* This proposal is restoring to the States, in effect, *the right to regulate commerce respecting a single commodity*—namely, *intoxicating liquor.* In other words, the State is not surrendering any power that it possesses but rather, by reason of this provision, in effect *acquires powers* that it has not at this time. * * *

Now, Mr. President, I think I have set forth * * * the view of the committee as expressed in this joint resolution.” (Italics ours.)

The resolution approved by the committee was substantially the same as the amendment finally passed. There was in addition a Section 3 which read as follows:

“Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquor to be drunk on the premises where sold.” (76 Cong. Rec. 1661.)

Most of the debate in the Senate and in the House was over these two questions:

1. Whether or not Section 3 should remain or should be stricken; and
2. The mechanics by means of which the amendment was to be approved by the States.

Section 2, of course, is the same section that is now Section 2 of the Twenty-first Amendment.

Senator Blaine continued with his own views (76 Cong. Rec. 4143) :

“Mr. President, my own personal viewpoint upon Section 3 is that it is contrary to Section 2 of the resolution. I am now endeavoring to give my personal views. The purpose of Section 2 is *to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors* which enter the confines of the States. The State under Section 2 may enact certain laws on intoxicating liquors, and Section 2 at once gives such laws effect. Thus the States are granted larger powers in effect and are given greater protection, while under Section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment. My view therefore is that Section 3 is inconsistent with Section 2, and the two sections are incompatible and that Section 3 ought to be taken out of the resolution.” (Italics ours.)

Section 3 was taken out of the resolution. Thereafter on a motion to reconsider the matter the following statements were made (76 Cong. Rec. 4225) :

“Mr. Swanson (Senator from Virginia). Consequently, it is left entirely to the States to determine *in what manner intoxicating liquors shall*

be sold or used and to what places such liquors may be distributed. Is that established definitely under Section 2 of the proposed amendment?" (Italics ours.)

Senator Robinson (Arkansas), who had the floor and to whom the question was addressed, responded:

"I think that is true."

Mr. Robinson continued:

"The language of Section 2 is perfectly plain." (The Senator here quoted the Section.) "That leaves to the States the power of regulation; it places the moral force of the Government of the United States behind the States in the enforcement of their laws; and that is exactly what we on this side of the Chamber are committed to in so far as we can be committed by a platform declaration."

Do these debates support the contention of these appellants?

Let us read again the statement that, "when our Government was organized and adopted, the States surrendered control over and regulation of interstate commerce", and that the Twenty-first Amendment was adopted for the purpose of "restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor". This is precisely the argument, almost word for word, as formulated by these appellants in their opening brief! This is precisely the opinion of the Court in *Joseph S. Finch & Co. v. McKittrick* (1938), 23 Fed. Supp. 244 (affirmed in 305 U. S. 395, 83 L. Ed. 246), where the Court said, at page 245:

"So far as that one commodity is concerned, the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution."

We come now to that portion printed under this subheading of appellee's brief (p. 20) though having no direct relation to it.

The appellee here offers what may be accurately termed an argument of fear by asserting to the Court, in substance, that, should the appellants' contention herein be sustained, entire federal jurisdiction over the liquor industry would be lost. Among the federal laws which would be imperiled by the contention of the appellants are The Federal Alcohol Administration Act, The Collier Act, The Liquor Enforcement Act of 1936, the Federal Trade Commission Act, and the Securities Act of 1933. That such a proposition does not follow either as a matter of law or of logic is too plain to merit extensive discussion.

It was not, and is not, the intention of these appellants to argue the application of every conceivable phase of federal law to the liquor industry. These appellants are indicted for violation of Sections 1 and 3 of the Sherman Antitrust Act, and it is the application of *that* law, and none other, which need be argued here.

The sole apparent motive of the appellee, in attempting to argue the application of every possible federal law to the liquor industry, is to becloud the issue involved in the present appeal, so that this Court may be led to believe that these appellants are, in substance,

asking this Court to rule that, since the adoption of the Twenty-first Amendment, *no federal law applies to the liquor industry.*

Such is not the contention of these appellants. They recognize that if they issue their securities in interstate commerce the Courts might hold them subject to the Federal Securities Act of 1933. They recognize that should they engage in deceptive trade practices they might be subjected to the jurisdiction of the Federal Trade Commission. They recognize that the Federal Government may ultimately be held to have power, irrespective of the Twenty-first Amendment, to establish labeling standards for liquors moving in interstate commerce, and to require a rectifier's permit from them if they engage in interstate trade. The reason these appellants have not heretofore engaged in a dissertation upon these laws is that these laws are not involved in the present case.

Is it inconsistent for these appellants to acknowledge possible federal power over the issuance of their securities, their trade practices, or the labeling standards of their goods (where the liquor moves in interstate commerce) and still to deny that the Sherman Antitrust Act applies to them? Certainly not.

In the discussion of the historical development of the status of intoxicating liquors as an article of commerce among the several states, appearing at pages 9 to 27 of our brief, we pointed out that, upon the enactment of the Twenty-first Amendment, the commerce clause of the Federal Constitution was qualified and limited as far as intoxicating liquors are con-

cerned, and that such liquors were removed from the operation of the commerce clause where the state had adopted laws regulating the importation and sale of such intoxicating liquors. Under the express terms of Section 2 of the Twenty-first Amendment, state law determines the terms and conditions of "importation" and of "delivery" or the "use" of intoxicating liquors imported into the state.

If state law is to be paramount with respect to *importation*, *delivery* and *use* of liquor, the state must have exclusive jurisdiction over those matters which are *indispensable attributes* to the regulation of such "importation", "delivery" or "use". What power must a state have if it is to regulate properly the delivery and use of liquors within its borders?

Indispensable to such regulation is the power, unfettered by the commerce clause, to say *who* shall consume intoxicating beverages, *where* such intoxicating beverages may be consumed, when such intoxicating beverages may be consumed, *how much* of said beverages may be consumed, and the *prices* at which such beverages are to be sold. Given these powers, a state can adequately govern the liquor industry within its borders. Lacking any of these powers, a state would be helpless to deal with the liquor trade. If, for example, a state could say who could drink, where, when, and how much, but could not say at what price the liquor should be sold (whether at high or low prices, posted prices, open prices, monopoly prices, etc.), its regulation of liquor would be fatally defective.

It is clear that the distinction between the legislative power to require certain types of labels (upon bottles of intoxicating liquor moving in interstate commerce) is substantially different from the legislative power to require that the prices for such intoxicating liquor be, or be not, set through certain methods and operations. The *inherent necessities* of the duty, placed upon the states under the Twenty-first Amendment, of regulating the liquor traffic require that, among other things, the states have the power to determine the method by which prices for such liquor shall be set. Whether such prices shall be set by state decree, by open competition, or any other method is a matter for the state to determine.

We have wandered far afield. We would not choose to do so had not the appellee's brief attempted to argue these collateral points, in speculating as to what action Courts would take in cases different from the case now specifically before this Court. These appellants do not, however, mean to recede from their stand that the only question before this Court is whether the Sherman Antitrust Act applies to the acts alleged in the indictment.

Before leaving this phase of the subject, another wholly different aspect of the Federal Alcohol Administration Act (27 U. S. C. A. Sec. 205), involved in the *Jameson* and the *Arow Distilleries* cases, should also be mentioned. Subsection (a) of that act prohibits "exclusive outlets"; subsection (b) prohibits "tied houses"; subsection (c) prohibits "commercial bribery"; subsection (d) prohibits "consignment

sales"; subsection (e) regulates labeling; subsection (f) regulates advertising.

In each subsection the requirement is that the prohibited act must be done "*in the course of interstate or foreign commerce*".

Subsections (a) to (d) inclusive are applicable

"to transactions between a retailer or trade buyer in any State and a brewer, importer, or wholesaler of malt beverages outside of such State *only to the extent* that the law of such State imposes similar requirements with respect to similar transactions between a retailer or trade buyer in such State and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be." (Italics ours.)

From the foregoing, it is apparent that the Federal Alcohol Administration Act does not supersede state regulations but is in aid of them because it is made applicable only to the extent that the state has adopted similar regulations of malt beverages. It is in connection with malt beverages that these defendants are indicted.

As respects subsections (e) and (f), the Act provides as follows:

"In the case of malt beverages, the provisions of subsections (e) and (f) shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in

any State from any place outside thereof, *only to the extent* that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof.” (Italics ours.)

Again we find the Federal Government making its law applicable as respects malt beverages only where the state has similarly acted.

The argument of the appellee seeks to show that, if the proposition of the appellants be true, that the acts of which they are accused in the indictment are not punishable under the Sherman Act, then the appellants are not subject to the Federal Trade Commission Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utilities Holding Act or the Federal Alcohol Administration Act because such acts were enacted by Congress under power derived from the commerce clause.

That argument of the appellee, if carried to its logical conclusion, would be tantamount to a statement by the appellee that the second section of the Twenty-first Amendment to the Constitution was absolutely meaningless, and that, notwithstanding the Twenty-first Amendment, Congress was free to regulate the transportation and importation of liquors in interstate commerce in precisely the same way it was prior to the adoption of the Eighteenth Amendment.

Merely to state the proposition is to prove its absurdity. Indeed, the appellee's argument proves too much. To illustrate: Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment. If the Twenty-first Amendment had stopped there, the power of Congress to regulate the liquor traffic commerce would be exactly what it was prior to the adoption of the Eighteenth Amendment. But the Twenty-first Amendment does not stop there. Section 2 of the Twenty-first Amendment says:

“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

Now those words of Section 2 must mean something. Prior to the adoption of the Eighteenth Amendment, no state, irrespective of its regulatory laws, could prevent or regulate the transportation or importation into its borders for delivery or use therein of intoxicating liquor except as permitted so to do by the Webb-Kenyon Act or the Wilson Act.

However, upon the adoption of the Twenty-first Amendment, that amendment became paramount law and the Congress no longer had the power to require the state to admit intoxicating liquors into its borders for delivery or use therein in contravention of its laws, something Congress could require prior to the adoption of the Eighteenth Amendment. If this is true, and every decision of the United States Courts says it is, it follows irresistibly that Section 2 of the

Twenty-first Amendment is a limitation of the power of Congress under the commerce clause.

STATES OF THE PACIFIC COAST AREA HAVE COMPREHENSIVE LEGISLATION RESPECTING INTOXICATING LIQUORS.

Under Title II, the appellee's brief (p. 22) states:

"II. The Laws of the States of the Pacific Coast Area do not Affect the Applicability of the Sherman Act in the Instant Case."

Under this title, appellee's brief (p. 22) says:

"A. State Legislation Relating in a General Way to Liquor Distribution does not Divest the Federal Government of Jurisdiction Over Interstate Commerce in Intoxicating Liquors."

So far as these appellants are concerned their contention is that each of the states comprising the Pacific Coast Area and the Territory of Alaska has a complete and comprehensive set of special and general laws regulating the manufacture, use, sale, exportation and importation of beer within, and from, and into its borders, and also has laws forbidding restraints of trade or commerce and the fixing or maintaining of artificial or non-competitive prices of commodities generally, but applicable to beer and other intoxicating liquors. (Appellants' brief, p. 5, and the appendix to said brief.)

The foregoing is far different from appellee's misleading statement in its brief at page 22, "that appellants contend that upon enactment by the states of the Pacific Coast Area of general legislation concerning the distribution of intoxicating liquors, the Fed-

eral Government was thereupon divested of all jurisdiction under the commerce clause over commerce liquors".

Again, on pages 25 and 28 of its brief, appellee seeks to convince this Court that the state laws referred to are only general and not specific and comprehensive laws passed solely for the control of traffic in intoxicating liquors in the several states.

Appellee then again refers to the *Jameson* case, heretofore discussed, "to defeat the contention" of appellants as to operation of State laws. In this reference (appellee's brief, p. 23) the appellee deliberately misstates the facts involved in the *Jameson* case by saying "In that case, the Government sought to exercise jurisdiction over *the importation of liquor into the State of New York, where comprehensive state legislation relating to liquor had been enacted*". (Italics ours.)

The *Jameson* case, *Wm. Jameson v. Morgenthau*, 307 U. S. 171, 83 L. Ed. 1189, came before the U. S. Supreme Court on appeal from a three judge district court judgment. The appeal was brought under 28 U. S. C. A. Sec. 380a on the theory that the constitutionality of the Federal Alcohol Administration Act was involved because it was alleged that the Twenty-first Amendment to the Constitution withdrew from Congress the authority to control *the importation of intoxicating liquors into the United States*.

The only point considered by the Court was the question of its jurisdiction to hear the appeal on its

merits. It decided that it lacked such jurisdiction but exercised its power to vacate the judgment of the Court below and remanded the case to the District Court for further proceedings to be taken independently of the section of the code referred to above.

There is not one word in the opinion about an importation into the State of New York or any other State than the United States itself. The suit was brought against the Secretary of the Treasury of the United States to enjoin interference with the importation of plaintiff's goods into the United States—*not New York*.

In view of the foregoing, it seems to us that appellee must be most fearful of the weakness of its argument in this case when it feels compelled to stoop to the attempted deception of opposing counsel and this Court in an effort to make a strong, supporting opinion out of one which has no bearing whatsoever on the contentions raised in the instant case.

So far as appellee's comments on our brief at page 25 of its brief are concerned, we believe that since appellee has not deemed it worth while to point out where our brief, pages 28-37, incorrectly stated the legal principles involved, we are not called upon to lengthen this brief by repeating or enlarging upon what we have already said as that is a complete answer to the contentions of appellee on this point.

Answering appellee's contention, page 27 of its brief, that our statement on page 38 of our brief that all of the states in the Area have "adopted laws

against restraint of trade and commerce", which are applicable to the distribution of beer, supports appellee's contention that since there is no conflict between these laws and the Sherman Act, that the latter, because there is no apparent conflict, prevails, we would call attention to the fact that under the Twenty-first Amendment where a state has undertaken by a comprehensive statute to regulate the traffic in intoxicating liquors, including the transportation and importation into that state, and in addition has legislation covering the very same field as that covered by the Sherman Act, to wit: the states' statutes prohibiting restraint of trade; then matters indispensably a part of the regulation of the delivery and sale of such liquors are not the proper subject of regulation by Congress under the commerce clause. In the field covered by the State laws affecting alcoholic liquors, the State laws are paramount. Federal and State power over commerce is not and cannot be concurrent. If the State is given power over the transporation, importation and sale of intoxicating liquors, including the power to define and control competition, under the Twenty-first Amendment, then the commerce power of Congress over the same subject matter is necessarily withdrawn. That is what the decisions of the Supreme Court say. (See our brief p. 28, et seq.)

The appellee, page 32 of its brief, invites the Court's attention to part of Section 22 of Article XX of the California State Constitution and implies that this section of the Constitution is the basis of all California liquor legislation, and further points out that that

constitutional provision specifically provides that the power of the State of California to regulate intoxicating liquors shall be "subject to the internal revenue laws" and "subject to the laws of the United States regulating commerce between foreign nations and among the states".

The proviso in that section of the California Constitution announces a limitation well settled in constitutional law; a limitation that is read into every statute passed by every state on every subject regardless of any state constitutional provision. The power of the State of California to legislate concerning liquor would be no more enlarged in scope by an omission of that limitation than it would be limited by being made expressly subject to all of the delegated powers of the Federal Government.

Under the title (p. 33 of Appellee's Brief) :

"III. The Indictment Sufficiently Alleges a Restraint which Directly Affects Interstate Commerce."

The appellee first quotes a statement from our brief (p. 39—really p. 40) in reference to the facts alleged in the indictment constituting a violation of the Webb-Kenyon Act. We are satisfied to stand on the complete statement as found on page 40 of our brief. As to the remainder of the argument of appellee under this title we feel that our brief is a sufficient answer.

As to Title V of appellee's brief, page 38, we only wish to point out that appellee's reference to or quotations from our brief either twist the meaning or by

quoting a few words from a paragraph make a deduction which is contrary to real intent of the whole paragraph. The purpose of these appellants in pointing to statutes of the Pacific Area States forbidding restraints of trade and commerce or the fixing or maintaining of artificial or non-competitive prices of commodities, including in their scope intoxicating liquors, was to point out to the Court that the State having occupied the field, and the State law under the Twenty-first Amendment being paramount, the Sherman Act could not in any way enter that field. Not at any rate under the facts stated in the instant indictment.

COUNT TWO OF THE INDICTMENT.

We feel it unnecessary to repeat our remarks on this count of the indictment as found in our brief, page 41. The same argument applies to this count as to Count One and having pointed out in our opening brief that the Territory of Alaska has a complete set of laws regulating the manufacture, use and sale of beer within its borders, of which this Court will take judicial notice, and furthermore has adopted the common law as respects restraints of trade and commerce, it follows that the Territorial laws, under the Twenty-first Amendment, are paramount and exclusive of the laws of the Federal Government on the same subject, consequently we urge that Count Two does not charge a public offense under Section 3 of the Sherman Act.

CONCLUSION.

We do not find anything in the arguments contained in appellee's brief that in any way offsets or contradicts our contentions as set forth in our opening brief and we therefore respectfully renew our prayer that the judgments of the Court below be reversed.

Dated, San Francisco, California,
April 7, 1943.

Respectfully submitted,

R. M. J. ARMSTRONG,

ALBERT L. CAMPODONICO,

Attorneys for Appellants,

Regal Amber Brewing Company

and William P. Baker.

No. 10,303

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WASHINGTON BREWERS INSTITUTE, REGAL
AMBER BREWING COMPANY, WILLIAM
P. BAKER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Western District of Washington, Northern Division.

**REPLY BRIEF ON BEHALF OF APPELLANTS,
ACME BREWERIES AND KARL F. SCHUSTER.**

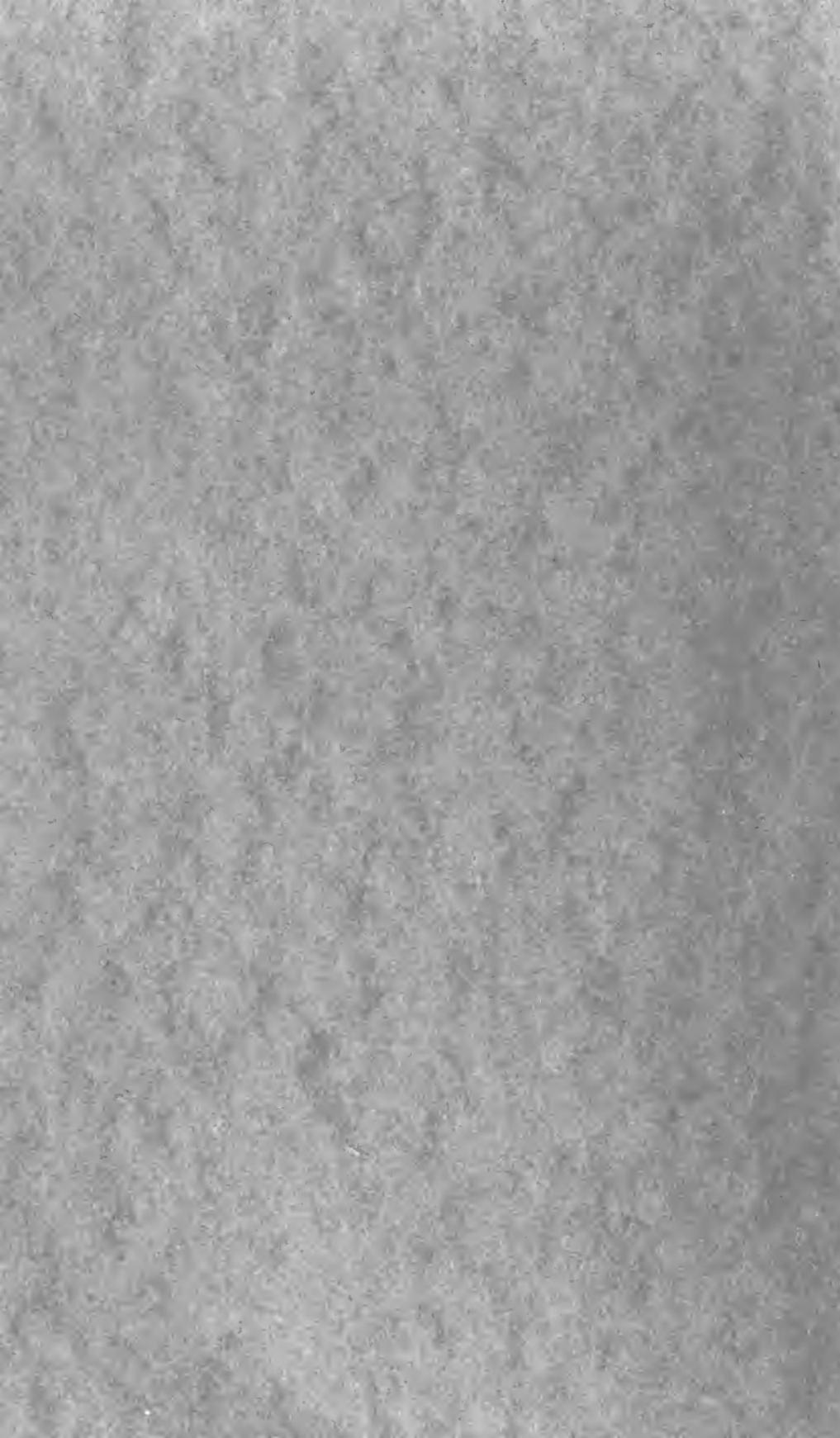
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FILED

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PAUL P. O'BRIEN,
CLERK



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Appellee concedes that to the extent that the state has legislated concerning delivery into, or use within, such state of intoxicating liquors, such legislation is paramount, and to the extent thereof, intoxicating liquors have been removed from interstate commerce and the jurisdiction of federal laws, the application of which is dependent upon interstate commerce	1
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**REPLY BRIEF ON BEHALF OF APPELLANTS,
ACME BREWERIES AND KARL F. SCHUSTER.**

APPELLEE CONCEDES THAT TO THE EXTENT THAT THE STATE HAS LEGISLATED CONCERNING DELIVERY INTO, OR USE WITHIN, SUCH STATE OF INTOXICATING LIQUORS, SUCH LEGISLATION IS PARAMOUNT, AND TO THE EXTENT THEREOF, INTOXICATING LIQUORS HAVE BEEN REMOVED FROM INTERSTATE COMMERCE AND THE JURISDICTION OF FEDERAL LAWS, THE APPLICATION OF WHICH IS DEPENDENT UPON INTERSTATE COMMERCE.

Appellee does not dispute that the State laws are paramount and that to the extent of State legislation intoxicating liquors have ceased to be an article of

interstate commerce. The Federal Government retains jurisdiction only to the extent that the field of regulation has not been occupied by the State. To the extent of inconsistency the Federal law is superseded. Almost the entire burden of appellee's argument is in answer to the contention urged by certain appellants that since the Twenty-first Amendment intoxicating liquors have been entirely removed from the domain of interstate commerce and Federal law founded upon the commerce clause of the Constitution.

We start, therefore, with the major premise of our argument conceded by appellee. The following questions remain:

1. Does an indictment lay the foundation for Federal jurisdiction and state an offense under the Sherman Act by simply alleging that intoxicating liquors were shipped interstate?
2. In view of the Twenty-first Amendment does an allegation of interstate shipment constitute an allegation of interstate commerce, and place upon the defendants the burden of defining the extent to which intoxicating liquor remains a subject of interstate commerce?
3. Are the acts with which the defendants are charged authorized by State laws?

THE INDICTMENT DOES NOT ALLEGE THE EXISTENCE OF
INTERSTATE COMMERCE.

The "nature and extent of * * * commerce involved" is defined by paragraph 15 (Tr. p. 16) of the indictment. The only allegation is that beer in substantial quantities has been shipped interstate.

Federal jurisdiction depends on interference with interstate commerce. The monopoly and restraint denounced by the Act are the monopoly and restraint of interstate and international trade or commerce. Unless the acts charged constitute a direct and substantial burden on interstate commerce, an indictment under the Sherman Act will not lie. Interstate commerce is an essential ingredient of the offense. It is conceded that an indictment to be sufficient must clearly and accurately define every ingredient of the offense. Appellants maintain that in the case of intoxicating liquor, the indictment must, in addition to the fact of interstate shipment, allege that the acts charged were not done under the authority of the laws of any State governing the delivery into or use therein of intoxicating liquor. Appellee contends, very briefly and inadequately as we shall show, that the allegation of interstate shipment is sufficient and that the existence of State laws must be set up by way of defense.

It is apparent that, in view of the fact that State laws are paramount, it is entirely consistent that all the facts alleged in the indictment may be true and yet no offense exist and the Federal Court not have jurisdiction.

"If the facts alleged may all be true and yet constitute no offense, the indictment is insuffi-

cient. * * * Every material fact and essential ingredient of the offense—every essential element of the offense—must be alleged with precision and certainty.”

27 Am. Jur., p. 621;

Fleisher v. United States, 302 U. S. 218, 82 L. Ed. 208;

United States v. Standard Brewery, 251 U. S. 210, 64 L. Ed. 229.

“Every ingredient of which the offense is composed must be accurately and clearly alleged.”

United States v. Cook, 17 Wall. 174, 21 L. Ed. 539.

It cannot, “be left in doubt or to mere inference, from the words of the indictment, whether the offense charged was one within Federal cognizance.”

Blitz v. United States, 153 U. S. 308, 38 L. Ed. 725, 728;

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

Since the enactment of the Twenty-first Amendment, the Sherman Act has by implication contained an exception that may be paraphrased as follows:

“Except, however, that in the case of intoxicating liquor, nothing done under the authority of the laws of any State governing the delivery into or use therein of intoxicating liquor, shall come within the scope of this Act or constitute a violation thereof.”

It was necessary for the indictment to negative this implied exception both to define an essential ingredient of the crime and to establish the jurisdiction of the Federal Court in which the indictment was brought. As all restraints and burdens upon interstate shipments of beer do not violate the Sherman Act, the indictment must show that the restraints and burdens in question come within Federal jurisdiction. Interstate shipments ordinarily constitute interstate commerce, the regulation of which is vested in the Federal Government. Where, however, as in this case, interstate shipment alone does not make beer an article of interstate commerce, there must be additional allegations that serve to positively bring it within that category.

The mere fact that the charge concerns beer makes the bare allegation that there have been interstate shipments insufficient to establish Federal jurisdiction. Federal jurisdiction will not exist *unless* consistent with State legislation.

Appellee by its heading (p. 36) suggests that the burden is on the defendant to ascertain what, if anything, charged in the indictment comes within Federal jurisdiction. According to appellee, everything will be assumed to be within Federal jurisdiction and not covered by authorization of State law, unless the defendants affirmatively establish the contrary. This is unsound. Jurisdiction of a Federal Court is never presumed. It must be clearly and distinctly alleged. Facts must be pleaded, which, if true, will positively establish jurisdiction. Jurisdiction cannot be left to

conjecture, inference or presumption. An allegation of interstate shipment of beer is in and of itself wholly inadequate to lay a foundation for Federal jurisdiction. An added factor is necessary. An indictment that does not set forth the existence of this added factor is insufficient.

In *Brown v. Keene*, 8 Pet. 115, Chief Justice Marshall said:

“The decisions of this Court require that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from the averments.”

In *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057, the Supreme Court said:

“As the jurisdiction of the Circuit Court is limited, in the sense that it has none except that conferred by the Constitution and laws of the United States, the presumption now, as well as before the adoption of the Fourteenth Amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears.”

See also

Mattingly v. N. W. Virginia R. R. Co., 158 U. S. 53, 39 L. Ed. 894.

Courts of the United States are of limited jurisdiction. “Jurisdiction cannot rest on mere inference, conjecture or argument but it must appear, in accordance with the rules of good pleading, by positive averment and specific allegations of fact which show clearly

and distinctly that a question under a Federal law is involved, and that the question is an essential or integral part of the case."

35 C. J. S. 913.

In order to support Federal jurisdiction under the Anti-trust Statute, it is essential that the acts complained of involve interstate commerce. The conclusion is inevitable that all facts necessary to establish interstate commerce must be affirmatively pleaded.

Appellee (p. 36) quotes an extract from 27 Am. Jur. 668, which is not in point. It has reference to the necessity of negativing an affirmative defense such as the Statute of Limitations. The only case relied upon by the text for the statement made is *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538. This case holds that where all of the ingredients of the crime are set forth in the indictment, it is sufficient and the Statute of Limitations cannot be availed of by demurrer. The Court took pains to indicate that every essential ingredient to establish the crime must be contained in the indictment:

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within the exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed."

The case of *United States v. Hutcheson*, 312 U. S. 219, 85 L. Ed. 778, cited by appellee (p. 37) has no bearing. The Court in that case held that the facts pleaded determine whether a crime is stated, irrespective of the particular statute that the pleader conceived had been violated. Likewise, in determining whether or not a crime has been stated, the Court will consider all pertinent Federal statutes. Concretely, in an indictment against labor unions for violation of the Sherman Act, the Court held that it would take into consideration the Norris-LaGuardia Act, which placed a congressional interpretation on Section 20 of the Clayton Act. Statutes need not be pleaded, but jurisdictional facts and all ingredients of the crime must be pleaded.

Appellee states that if required to allege the absence of State laws, it would be necessary to prove the allegation and the manner of proof would be "interesting". It is always necessary to plead jurisdictional facts and essential ingredients of the offense. Difficulty of proof does not eliminate this requirement. Furthermore, it is no more difficult for the prosecution to prove what the State laws cover and authorize than for the defendants.

THE ACTS CHARGED ARE AUTHORIZED BY STATE LAWS.

Appellee contends that as the indictment charges a combination among distributors of beer to fix the prices at which they will sell the commodity, it charges something in violation of the Sherman Act and not

authorized by State laws. The indictment does something more. It sets forth the specific manner by which the conspiracy was to be effectuated. The general allegation is limited by the specific means.

United States v. Great Western Sugar Co., 39 Fed. (2d) 149.

If the necessary effect of State regulations is an elimination of competition and the establishment and maintenance of uniform prices for beer, it cannot be a crime to combine or conspire to attain such necessary effect by compliance with such regulations. The object as well as the means have been made lawful.

At this point we would like to refer to a recent decision by the Supreme Court, *Parker, etc. v. Brown*, Law Edition Advance Opinions, Vol. 87, No. 6, page 235. This case involved raisins, a normal subject of interstate commerce. The question was the validity of State legislation that authorized restraints, artificial price fixing and enforced price adherence in connection with raisins, peculiarly an article of interstate commerce, in a manner and to an extent wholly inconsistent with the Sherman Act. The validity of the legislation was upheld.

“The California Agricultural Prorate Act authorizes the establishment, through action of State officials, of a program for the marketing of agricultural commodities produced in the State, so as to restrict competition among growers and maintain prices in their distribution of their commodities to packers * * * It clothes the committee with power and imposes on it the duty to control marketing of the crop so as to enhance

the price or at least to maintain prices by restraints on competition of producers in the sale of their crop. The program operates to eliminate competition of the producers in the terms of sale of their crop, including price. And since 95% of the crop is marketed in interstate commerce, the program may be taken to have a substantial effect on the commerce in placing restrictions on the sale and marketing of the product to buyers who eventually sell and ship it in interstate commerce.

* * *

We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a State or its officers or agents from activity directed by its legislature. * * *

But they (State regulations) are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress."

In the case of beer, the supreme law of the land has established that local regulation, whatever its effect or extent, shall be paramount. It is clear that if the necessary effect of State regulation is the enhancement and maintenance of uniform prices and elimination of competition, a conspiracy to enhance and maintain prices and eliminate competition by compliance therewith, cannot be held to be criminal under the Federal law.

Appellee appears surprised that the State should by regulation authorize the price of beer to be raised, fixed, stabilized and controlled. While the object and purpose of the State in eliminating competition in the case of intoxicating liquor is not the same as in eliminating competition in the case of raisins, the reason is equally sound. The consumption and use of intoxicating liquor must not be inordinate; the public demand must not be whipped up or incited by low and competing prices; the fear is not that the public will buy too little but that it will buy too much.

An analysis of the State laws and regulations discloses a clear intent to maintain and enforce price uniformity and to render it impossible for a dealer to obtain an advantage by reduction in price or allowance of concessions. Prices must be publicly announced well in advance of becoming effective, and if any price posted should constitute a reduction, it may forthwith be met by any other dealer. Sellers are forced to agree upon or accept a certain level of prices and adhere to them. A necessary result of following out the directions of the State laws cannot be illegal.

The nature of the subject-matter makes this case unique. The public is protected against the evils resulting from competition, instead of being guaranteed the benefits of freedom of competition. There is no analogy between the case at bar and *Keogh v. Chicago N. W. Ry. Co.*, 260 U. S. 156, 67 L. Ed. 183. (Appellee's Br. p. 29.) The filing of schedules of rates with the Interstate Commerce Commission for approval is to insure reasonableness of rates and nondiscrimination.

Posting of prices in the case of beer is one of a group of regulations calculated to eliminate competition and maintain uniformity of price.

CONCLUSION.

It is respectfully submitted that the indictment is insufficient and the demurrer thereto should be sustained.

Dated, San Francisco,

April 9, 1943.

Respectfully submitted,

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON BREWERS INSTITUTE, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

WASHINGTON BREWERS INSTITUTE, HENRY T. IVERS, H. J. DURAND, OLYMPIA BREWING COMPANY, PETER G. SCHMIDT, ADOLPH D. SCHMIDT, COLUMBIA BREWERIES, INC., EAST IDAHO BREWING CO., INC., JOSEPH F. LANSER, HARRY P. LAWTON, E. LOUIS POWELL, CALIFORNIA STATE BREWERS INSTITUTE, JAMES G. HAMILTON, SEATTLE BREWING & MALTING CO., THE SPOKANE BREWERY, INC., WILLIAM H. MACKIE, RENE BESSE, EMIL G. SICK, GEORGE W. ALLEN, PIONEER BREWING CO., RUSSELL G. HALL, BOHEMIAN BREWERIES, INC., EDWIN F. THEIS, IDAHO BREWERS INSTITUTE, STEVE T. COLLINS, OVERLAND BEVERAGE CO., BECKER PRODUCTS CO., GUS L. BECKER, C. C. WILCOX, THE BREWERS INSTITUTE OF OREGON, GEORGE F. PAULSEN, INTERSTATE BREWING CO., G. V. UHR, PACIFIC BREWING & MALTING CO. AND JAMES E. KNAPP.

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON BREWERS INSTITUTE, *et al.*, }
Appellants,
vs.
UNITED STATES OF AMERICA, }
Appellee. } No. 10,303

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

Washington Brewers Institute, Henry T. Ivers, H. J. Durand, Olympia Brewing Company, Peter G. Schmidt, Adolph D. Schmidt, Columbia Breweries, Inc., East Idaho Brewing Co., Inc., Joseph F. Lanser, Harry P. Lawton, E. Louis Powell, California State Brewers Institute, James G. Hamilton, Seattle Brewing & Malting Co., The Spokane Brewery, Inc., William H. Mackie, Rene Besse, Emil G. Sick, George W. Allen, Pioneer Brewing Co., Russell G. Hall, Bohemian Breweries, Inc., Edwin F. Theis, Idaho Brewers Institute, Steve T. Collins, Overland Beverage Co., Becker Products Co., Gus L. Becker, C. C. Wilcox, The Brewers Institute of Oregon, George F. Paulsen, Interstate Brewing Co., G. V. Uhr, Pacific Brewing & Malting Co. and James E. Knapp.

LIQUOR ENFORCEMENT ACT OF 1936

Before replying to the Government's principal arguments, we desire to eliminate those matters upon which there is no dispute. At page 10, *et seq.*, of the

Government's brief, a number of cases are cited which involve the Liquor Enforcement Act of 1936.¹ This Act is by its very terms an Act to enforce the Twenty-First Amendment. We have no where contended that the Federal Government lacks authority to enforce that amendment. At page 25 of our opening brief we conceded that the Federal Government had the *duty* to enforce the Twenty-First Amendment.

Thus also the decision in the *Arrow Distilleries Case*² (cited at pages 9, 23, 34 Gov't. Br.) is based upon the principle that the Federal Government has power to enforce the Twenty-First Amendment.

THE WM. JAMESON CASE

With the case of *Wm. Jameson Inc. v. Morgenthau*³ (cited at pages 10, 23, 25 Gov't. Br.) we have no quarrel. It is obviously correct but of no application to the instant case. That case deals with the power of the Federal Government over foreign commerce. While the power to regulate foreign and interstate commerce is conferred by the same clause of the constitution the two powers are separate and distinct by name and nature. The Twenty-First Amendment does not deal with the former but solely with the latter. The delegation by the Constitution of power to regulate foreign commerce is complete and absolute of necessity while delegation of power over commerce among the states is relative.

Control of foreign commerce is an essential *national*

¹ 49 Stat. 1928, 27 U.S.C.A. 221, *et seq.*

² 109 F.(2d) 397.

³ 307 U.S. 171.

characteristic. Control over internal commerce under the Federal system is not. It is difficult to conceive how a nation could be called such under our system without complete power over foreign commerce without limitation of any kind. Control over internal commerce was limited to that among the several states and with the Indian tribes and then for the purpose only of securing and insuring the freedom of such commerce. Thus, the Supreme Court said:⁴

“And, again in the constitution, the power to regulate commerce is conferred by the same words of the commerce clause with respect both to foreign commerce and interstate commerce. Yet the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce. In the regulation of foreign commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states.”

Under our system of government there can be no importation into a state from a foreign nation. There can only be an importation into the United States. Foreign commerce is between citizens of the United States (not citizens of a state) and citizens of a foreign nation.⁵ Hence, the language of the Twenty-

⁴ *Atlantic Cleaners & Dyers v. U. S.* 286 U.S. 427.

⁵ *United States v. Steffen*, 100 U.S. 82, at 96; *Henderson v. New York*, 92 U.S. 259 at 270; *United States v. Halliday*, 3 Wall (U.S.) 407 at 417.

First Amendment, "transportation or importation into any state" can and must refer only to commerce among the states and not to foreign commerce.

REFERENCES TO LEGISLATIVE DEBATE

Government counsel answer our references to the Senate debate on the Twenty-First Amendment by stating that the language is clear and unambiguous and, therefore, resort may not be had to legislative expressions (Gov't. Br. p. 16). Thereupon counsel resorts to a brief—an all too brief—analysis of the same debate to demonstrate that our conclusion is wrong.

It must be admitted that language of the Twenty-First Amendment is simple, clear and in itself unambiguous. Applied to certain facts its application seems clear.⁶ However, under other circumstances its legal effect may not be clear without resort to sources other than the amendment itself. This, we believe, will become abundantly clear when we discuss the Government's first and principal contention.

We shall not repeat our references to and quotations from the senate debate to demonstrate the erroneous conclusions drawn therefrom by counsel. However, we do feel constrained to call the court's attention to the reference to and quotation from congressional debate which appears in the *Flippin Case*⁷ cited by the Government in which the Circuit Court of Appeals for the Eighth Circuit quotes with approval

⁶ *State Board, etc., v. Young's Market*, 299 U.S. 59.

⁷ *Flippin v. U.S.*, 121 F. (2d) 742.

the following excerpt from the report of the House Committee on Ways and Means on the Cullen Act as follows:

“The liquor traffic will be controlled by the Federal Government only to the extent that the states may desire; and that is in keeping with the *obvious intent* of the Twenty-First Amendment.”
(italics quoted)

This report was made at a time when the Twenty-First Amendment was before the people.

REPLY TO APPELLEE'S PRINCIPAL CONTENTION

We come now to the Government's principal contention. It is stated as follows (Gov't. Br. p. 8) :

“The Twenty-First Amendment does not deprive the United States of the power to regulate interstate commerce when such commerce *is carried on without violation of state laws.*”

This contention means that with respect to commerce among the states in intoxicating liquor:

- (1) Federal Jurisdiction *extends* to commerce which
 - (a) *Complies* with positive state legislation
 - (b) Is not contrary to state law or where no state law has been enacted
- (2) Federal Jurisdiction *does not extend* to commerce which
 - (a) *Violates* positive state law.

This contention is wrong on every count. Immediately after stating this contention counsel cite numerous cases based on the Liquor Enforcement Act of 1936 which provides punishment for the *violation* of state laws, a power (and the only power) obviously

delegated to the Federal Government by the Twenty-First Amendment. Thus, its own citations brand as erroneous the contention that Federal jurisdiction fails when the commerce involved violates state law.

The Supreme Court cases cited by us and noticed by the Government (Gov't. Br. pp. 14-15) demonstrates the error of the first proposition that Federal jurisdiction extends to commerce which *complies* with state legislation. These cases are thoroughly analyzed in our opening brief and we will not repeat that analysis (App. Br. pp. 18 to 24). Appellants have insisted at all times that it was this attitude on the part of the Federal authorities, which led to the present indictment.

The Twenty-First Amendment *prohibits* transportation and importation into any state in violation of the laws thereof. Therefore, the Twenty-First Amendment *permits* only transportation and importation into any state which *complies with* or *does not violate* state law. It leaves no room for the application of any federal law to apply to this commerce (except that which enforces the Twenty-First Amendment). The state laws and those laws alone and exclusively govern the legality and illegality of this commerce.

In opposition to the Government's contention we have at all times contended that with respect to this commerce

- (1) Federal jurisdiction *does not extend* to commerce which
 - (a) *Complies* with state law;
 - (b) Is not contrary to state law.

- (2) Federal jurisdiction *does extend* to commerce which
(a) *Violates* state law.

There is no argument or authority in the Government's brief which answers or even attempts to answer this contention.

If under the allegations of the indictment before the court the Government proved that the appellants combined and agreed to

1. Secure adherence, as required by state law, to prices posted as required by state law;
2. Secure observance of state law requiring prices to be posted according to established zones;
3. Secure posting and adherence to prices on a delivered basis only as required by state law, thus eliminating freight differentials;
4. Secure adherence to state law limiting, curtailing or forbidding the extension of credit;
5. Secure adherence to the prohibition of state law concerning quantity discounts,

a conviction would be warranted if the Sherman Act was applicable, and such proof would sustain the allegation of the indictment. These identical practices were declared by the Supreme Court to constitute a combination in restraint of trade in *Sugar Institute v. United States*.⁸

Yet on this proof appellants would be convicted for combining and agreeing to observe laws which they are bound to observe at their peril. They would be convicted of criminal conspiracy when neither the purpose nor the means of the combination were illegal.

⁸ 297 U.S. 535.

STATE LAWS AND PRICE FIXING

Appellee argues that the state laws and regulations do not require, permit, authorize or condone price fixing. This we vigorously deny. The state laws do *require* price fixing. The laws and regulations which we have set forth in our opening brief effectively accomplish price fixing and are obviously so intended. They provide how, when and according to what conditions appellants shall establish prices. They require appellants to announce publicly what their prices will be at least ten days before such prices become effective. Once announced the prices must remain in effect without deviation until another public notice at least ten days in advance is given. Each of appellants must file prices in the same manner and according to the same formula. Compliance in any manner with these state laws must bring about a fixing of prices. Such a result is inevitable. Short of naming price by law this method is perhaps the most effective means which could be adopted.

The court will recall that this method was adopted as the price fixing method under the National Recovery Act. It was recognized as being contrary to the Sherman Act and the N.R.A. provided for the suspension of the Sherman Act.

Appellee points to the allegations of the indictment concerning discussions and agreements concerning prices to be posted. Assuming those allegations to be true, there is nothing in the state laws prohibiting such discussions or agreements. Nor are they inconsistent with the provisions of those laws. The requirement that competitors be notified at least ten days

before any price change is made is in itself an enforced discussion. Any analysis of the practical working of these laws must convince any reasonable mind that they compel the very result which in most other instances is sought to be accomplished by so-called price-fixing agreements.

It must be remembered also that the state at all times has control of the situation. Under the law they have the industry under close surveillance. The prices are filed with them. They enforce adherence to those prices. If appellants file prices concertedly the state knows that fact. It would be impossible for appellants to do any of the things charged in the indictment without the full knowledge of the state. All books and records are open to and are frequently inspected. Every act and transaction is scrutinized by state enforcement officers.

If the state felt that any of its regulations were being violated, or if the appellants were engaging in practices concerning prices which the state considered inimical to public welfare it has authority to punish violations and if necessary to name the prices at which appellants' products shall be sold. That they have not seen fit to do this is conclusive of their opinion that nothing wrong has been done. Appellee alleges that this conspiracy began in 1935 and continued to the date of the indictment. These regulations have been effective during that time. This indictment was returned almost two years ago. None of the regulations or laws have been changed.

Apparently the states are quite satisfied with the

conduct of appellants in spite of what one section of the Department of Justice has thought of it.

CONCLUSION

Appellee has failed completely to answer appellants' contentions. The decision and judgment of the lower court should be reversed.

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No. 10314

United States
Circuit Court of Appeals
For the Ninth Circuit.

AL PIANTADOSI,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division

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DEC 15 1942

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and canceled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

J. M. DANZIGER, Esq.,
1400 Continental Building,
Los Angeles, California.

For Appellee:

LOEB AND LOEB,
MILTON H. SCHWARTZ, Esqrs.,
523 W. 6th St.,
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 2027-O'C—Civil

AL PIANTADOSI,

Plaintiff,

vs.

LOEWS' INCORPORATED, a corporation,
METRO-GOLDWYN-MAYER CORPORATION,
a corporation, LEO FEIST, INC., a
corporation,

Defendants.

**FIRST AMENDED COMPLAINT COPYRIGHT
INFRINGEMENT**

By leave of Court the plaintiff herein files this, his First Amended Complaint and for cause of action against the defendants, complains and alleges:

I.

That plaintiff is a citizen of the State of California. That defendant Leo Feist, Inc. is a corporation incorporated under the laws of the State of New York; that defendant Loews' Incorporated is a corporation under the laws of the State of Delaware, and defendant Metro-Goldwyn-Mayer Corporation is a corporation under the laws of the State of New York.

That this action arises under the Copyright Act approved March 4, 1909, as hereinafter more fully appears.

II.

That prior to May 16, 1912, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote the music of an original musical composition entitled, "That's How I Need You".

III.

That the music of this musical composition is wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

[2]

IV.

That prior to May 16, 1912, plaintiff complied in all respects with the Copyright Act of March 4, 1909, and all other laws governing copyrights, and secured, jointly with his co-authors, the exclusive rights and privileges in and to the copyright of said musical composition, and received from the Register of Copyrights a certificate of registration.

That said copyright was duly renewed by plaintiff by application filed with the Register of Copyrights on June 1, 1939, on which a certificate of the renewal of said copyright was duly issued to plaintiff by the Register of Copyrights identified as follows: "Renewal Registration No. 75877".

V.

Since June 1, 1939, plaintiff has been and still is the sole proprietor, jointly with his co-authors, of all rights, title and interest in and to the copyright in said musical composition.

VI.

That since May 16, 1912, said musical composition has been published by plaintiff and all copies of it made by plaintiff or under his authority have been printed and published in strict conformity with the provisions of the Copyright Act of March 4, 1909, and all other laws governing copyright.

VII.

That about June 1, 1941, defendants infringed said copyright by using said musical composition and publicly performing the same in a motion picture named, "Barnacle Bill" in which Wallace Beery is portrayed in the singing of said musical composition. That said defendants have repeated the said infringement on at least one hundred forty thousand occasions by repeated exhibitions of said motion picture, each exhibition being a separate infringement.

That plaintiff asserts a separate cause of action for each such infringement and said separate causes of action are joined for the sake of convenience because the convenient administration of justice will be promoted by such joinder, and a multiplicity of separate actions against the defendants arising on similar sets of facts will be avoided. [3]

VIII.

That at no time has plaintiff, or his co-owners, or any of them, licensed or permitted the defendants, to use said musical composition in the making of said motion picture.

IX.

That plaintiff has notified defendants Loews' Incorporated and Metro-Goldwyn-Mayer Corporation that defendants have infringed the copyright of plaintiff, and said defendants have continued to infringe the copyright.

X.

That defendant Leo Feist, Inc. has purported to license defendant Loews' Incorporated to use said musical composition which license is without right.

For a Further, Separate and Distinct Cause of Action Against Defendant Leo Feist, Inc., Plaintiff Alleges:

I.

That defendant Leo Feist, Inc. is a corporation incorporated under the laws of the State of New York.

II.

That plaintiff is the sole proprietor, jointly with his co-authors, of all rights, title and interest in and to the copyright of the following named musical compositions, to-wit:

Name of Song	Entry No.	Renewal No.
When She Gets Back I'm Going Away	Exxc 215193	54986
Ski-da-me-rink-a doo (Means I Love You)		
That Italian Rag (Piano)		
Dreamy Italian Waltz	Exxc 251629	70705
I'd Still Believe in You	Exxc 323893	93679
Way Down in Cotton Town	Exxc 219566	54984
Be Jolly, Molly	Exxc 219579	54982
I'm Glad I'm Irish	Exxc 219570	60696
The Vampire	Exxc 223569	60697

Name of Song	Entry No.	Renewal No.
The King of the Wide Wide World		
Let Georgia Do It	Exxe 225213	60699
That Italian Rag	Exxe 223871	60698
Fido Simply Said "Bow Wow"	Exxe 238600	67263
Wops, My Dear	Exxe 275995	75387
Funny Moon	Exxe 238605	67267
In All My Dreams I Dream of You	Exxe 238609	67269
San Francisco Glide	Exxe 238603	67265
That Dreamy Italian Waltz	Exxe 238602	67264
That Toledo Tune	Exxe 246186	70921
Mother's Child	Exxe 257767	70708
" "	Exxe 246185	70920
When Broadway Was a Pasture	Exxe 250104	70703
That Long Lost Chord	Exxe 251632	70706
Summer Days	Exxe 257771	70709
" "	Exxe 254584	70707
Honey Man, My Little Lovin' Honey Man	Exxe 261634	70710
Give Me a Small Town Sweetheart	Exxe 262882	74349
I Just Met the Fellow That Married the Girl That I Was Going to Get	Exxe 262883	74350
Somehow I Can't Forget You	Exxe 865522	74352
Love Is a Peculiarity	Exxe 284500	75876
Whose Going to Do Your Lovin' When I'm Gone	Exxe 279241	75390
I've Loved You Since You Were a Baby	E 348554	
I'm Looking for Antone		
I'm Sending a Message to Mama	Exxe 278466	75389
I Didn't Mean to Make You Cry	Exxe 219572	54983
Not Me	Exxe 219581	54985
Take Me With You Cutie and Forget to Bring Me Back	Exxe 238606	67268
Think It Over, Mary	Exxe 240497	65037
Take Me With You Into Loveland	Exxe 238604	67266
I Didn't Raise My Boy to Be a Soldier		
Haven't You Forgotten Something, Dearie	Exxe 250099	70702
When You Play in the Game of Love	Exxe 323704	94562
" " " " " " "	Exxe 310251	87456

[5]

Name of Song	Entry No.	Renewal No.
As I Have Forgiven You		
When You're in Love With Someone		
Who Is Not in Love With You		
I'm Looking for a Dear Old Lady		
You're Going to Wish You Had Me		
Back	Exxe 250105	70704
It's the Wonderful Way He Loves	Exxe 311524	88568
As Deep as the Ocean Is Blue	Exxe 314296	87823
You Look Just Like Your Mother, Mary	Exxe 321723	93678
I'm So Tired of Dreaming	Exxe 262884	74351
Skid-dy-mer-rink-adink	Exxe 228987	55898
Love Isn't Always Laughter	Exxe 269565	74354
Whose Loving Darling Are You	Exxe 279981	75391
Your Daddy Did the Same Thing		
Fifty Years Ago	Exxe 282606	75875
That's How I Need You	Exxe 284725	75877
When I Marry the One I Love	Exxe 298762	84468
Any Boy Could Love a Girl Like You	Exxe 304342	86865
Then I'll Stop Loving You	Exxe 304582	86866
Melinda's Wedding Day	Exxe 308062	86098
" " "	Exxe 300836	86862
Cute and Cunning Wonderful Baby Doll	Exxe 308061	85217
I Want My Man	Exxe 292180	77634
Oo-Ga-Lee-Oo-Ga-Lee-Oo	Exxe 305274	86717
Where Was Moses When the Light		
Went Out	Exxe 309846	88567
The Million Dollar Gambler From		
the West	Exxe 314297	87824
Rusty-Can-O-Rag	Exxe 238611	67270
That Italian Serenade	Exxe 269264	74353
Rafferty's Chimes	Exxe 329007	97475
" " "	Exxe 329726	97099
When the Roses Fade Away		
Firefly (My Pretty Firefly)		[6]
I've Only One Idea About the Boys		
I've Only One Idea About the Girls	E 343757	
" " " " " " "	E 347572	
At the Yiddisha Wedding Jubilee	E 343756	
My Own Venetian Rose	:	

Name of Song	Entry No.	Renewal No.
On the Shores of Italy	E 339728	
" " " " "	E 343339	
" " " " "	Exxe 329973	97086
Darkies Serenade		
Venetian Rose (Inst)		
The Curse of an Aching Heart	Exxe 308049	85216
" " " " "	Exxe 314785	87880
" " " " "	Exxe 305286	86718
I'd Let You Do It All Over Again		
You Can Always Count on Me		
Mother's Apron Strings		
I Wonder Why No One's in Love With Me (Original Entitled All the World's in Love With Someone)		
With a Smile on My Face and a Tear in My Heart		
Ain't I Got You—Ain't I Got You		
One Word of Consolation		
After the Dance		
People Like Us		
What Will Become of Me		
I've Lost All My Love for You (Originally Entitled "You Killed All My Love for You")		
Mother, I Didn't Understand		
Pal of My Cradle Days		
Rose of the Evening		

[7]

II.

That defendant Leo Feist, Inc. claims to own the copyright on said musical compositions and has, without right, obtained a renewal of the copyright on some of the said compositions.

Wherefore, plaintiff demands:

- (1) That defendants, their agents and servants be permanently enjoined from infringing said copyrights of said plaintiff in any manner.

(2) That defendants be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendants' infringement of said copyrights and to account and pay over to plaintiff all the gains, profits, and advantages derived by defendants and all of them, from their infringement of plaintiff's copyrights, or such damages as to the Court shall appear proper within the provisions of the copyright statutes, but not less than Two Hundred and Fifty Dollars (\$250.00) for each of the first Ten (10) infringements, and not less than Ten Dollars (\$10.00) for each subsequent infringement and aggregating the sum of One Million four-hundred thousand dollars (\$1,400,000.00).

(3) That it be decreed that defendant Leo Feist, Inc. is not the owner of any interest in any of the copyrights on any of the musical compositions listed in Paragraph I of the second cause of action herein and that said defendant be required to convey and transfer to this plaintiff all rights which it may have obtained by reason of any Renewal or Copyright by it on any of said musical compositions. That said defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of the acts of said defendant and to account and pay over to plaintiff all of the gains, profits and advantages derived by said defendant Leo Feist, Inc. from its infringement of plaintiff's copyright.

(4) That defendants pay to plaintiff the costs

of this action and reasonable attorney's fees to be allowed to the plaintiff by the Court.

(5) That plaintiff have such other and further relief as is just.

J. M. DANZIGER,

Attorney for Plaintiff, Suite 1400, 408 South Spring Street, Los Angeles, California.

[Endorsed]: Filed Mar. 2, 1942. [8]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS LOEW'S INCORPORATED AND METRO - GOLDWYN - MAYER CORPORATION TO FIRST AMENDED COMPLAINT

Defendants Loew's Incorporated and Metro-Goldwyn-Mayer Corporation answer the First Amended Complaint on file herein as follows:

I.

Answering defendants deny the allegations contained in paragraphs V and VIII of the first cause of action, or in either of them.

II.

Answering defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs II, III and VI of said first cause of action, or in any or either of them. [9]

III.

Answering paragraph IV of said first cause of action answering defendants admit and allege that on or about May 16, 1912 said musical composition was duly and regularly registered for copyright by Leo Feist, the proprietor thereof, and a certificate of copyright duly and regularly issued to said Leo Feist; and that on or about May 22, 1939 said copyright was duly and regularly renewed by Leo Feist, Inc., Joe McCarthy and Joe Goodwin. Answering defendants are informed and believe and therefore allege that prior to May 22, 1939, and again subsequent to May 22, 1939 and prior to any use of said musical composition by answering defendants, said Joe McCarthy and Joe Goodwin assigned all of their right, title and interest in and to said renewal and in and to all rights created, granted or conferred thereby, to said Leo Feist, Inc. Answering defendants further admit that on or about June 1, 1939, plaintiff purported to renew said copyright in his own name, but allege that said purported renewal was void and ineffective in that, as answering defendants are informed and believe and therefore allege, plaintiff was not at said time, or at any time, the author or proprietor of said musical composition, or entitled to renew said copyright. Save and except as herein expressly admitted answering defendants deny generally and specifically each and every allegation contained in said paragraph IV.

IV.

Answering paragraph VII of said first cause of action answering defendants admit that defendant Loew's Incorporated used said musical composition and publicly performed it in a motion picture production named "Barnacle Bill" in which Wallace Beery is portrayed in the singing of said musical composition; and that said motion picture has been repeatedly exhibited. Save and except as herein expressly admitted answering defendants deny generally and specifically each and every allegation contained in said [10] paragraph VII.

V.

Answering paragraph IX of said first cause of action answering defendants admit that plaintiff has notified them of his claim that they are infringing his alleged copyright. Save and except as herein expressly admitted, answering defendants deny generally and specifically each and every allegation contained in said paragraph IX.

VI.

Answering paragraph X of said first cause of action answering defendants admit and allege that Leo Feist, Inc. has in fact licensed Loew's Incorporated to use said musical composition, under and by virtue of the copyright therein, which copyright is and at all times material herein has been owned by said Leo Feist, Inc. Save and except as herein expressly admitted answering defendants deny generally and specifically each and every allegation contained in said paragraph X.

VII.

Answering defendants do not answer the second cause of action for the reason that it is not directed against them or either of them.

VIII.

There is a non-joinder of necessary parties plaintiff in that said First Amended Complaint shows on its face that persons other than plaintiff are co-owners of the copyright in respect of which infringement is alleged, which persons are not joined as parties to the action.

IX.

Answering defendants are informed and believe and therefore allege that plaintiff has assigned to Leo Feist, Inc. all of his right, title and interest in and to all copyrights, renewal copyrights and rights of renewal, of said musical composition. [11]

X.

Answering defendants are informed and believe and therefore allege that said musical composition was written and composed by plaintiff as an employee of Leo Feist, under and pursuant to a contract of employment, by reason whereof Leo Feist, and thereafter his successor in interest Leo Feist, Inc., became and at all times has been the owner and proprietor of said musical composition and of all copyrights, renewal copyrights and rights of renewal therein and thereto.

Wherefore, answering defendants pray judgment

that plaintiff take nothing as against them by reason of his said First Amended Complaint, that the same be dismissed on the merits with said defendants' costs incurred herein, and for such other and further relief as to the court may seem proper.

LOEB AND LOEB,

By HERMAN F. SELVIN,

Attorneys for answering defendants.

(Verified.)

[Endorsed]: Filed Mar. 12, 1942. [12]

[Title of District Court and Cause.]

INTERROGATORIES TO BE ANSWERED BY
DEFENDANTS LOEW'S INCORPORATED
AND METRO-GOLDWYN-MAYER CORPO-
RATION

The plaintiff herein propounds the following interrogatories to be answered by any officer of each the defendants Loew's Incorporated and Metro-Goldwyn-Mayer Corporation competent to testify on its behalf, in writing, under oath, the answers to be served in accordance with the Rules.

Interrogatory 1:

State your name, address, length of service and official position with the corporation for whom you answer these interrogatories.

Interrogatory 2:

State whether there is to your knowledge, a license or other agreement between Leo Feist, Inc., and/or Metro-Goldwyn-Mayer Corporation and Loew's Incorporated, concerning the song "That's How I Need You."

Interrogatory 3:

Does your corporation have in its custody, or control, either the original or a copy of any such license, or other agreement between Leo Feist, Inc. and your Company, licensing or granting the right to use a song entitled "That's How I Need You" in any motion picture film, and particularly in the [13] film called "Barnacle Bill" in which Wallace Beery is portrayed as singing said song?

Interrogatory 4:

State whether such license or other agreement is in writing, and if so, please produce a copy of same and attach it to these interrogatories, and produce copies of any and all correspondence between Leo Feist, Inc. and your Company of and concerning the execution of said agreement or agreements.

Interrogatory 5:

If you refuse or are unable to produce the same or copies thereof, please state the terms of licensing, in detail.

Interrogatory 6:

If such license agreement is not in writing, please state the terms thereof, the date when made, the

parties thereto, their official positions with their respective companies.

Interrogatory 7:

If any consideration or payments were paid for or under such license or other agreement by your Company, state the amount thereof, the date of payment, to whom paid, how paid, and produce a copy of any check or other evidence of payment; also produce copy of any correspondence relating to such payments.

Interrogatory 8:

State whether your Company has in its possession or under its control a copy of the contract of employment between Leo Feist or Leo Feist, Inc. and Al Piantadosi, the plaintiff herein, referred to in Paragraph X of the Answer of your Company in this case, and produce a copy of same.

Interrogatory 9:

If you refuse or are unable to produce a copy of same, please state the terms thereof, and your source of information, and if such information is in writing, please produce such writing or a copy thereof.

Interrogatory 10:

State whether your Company has in its possession or under its control, a copy of any agreement between Joe Goodwin, and/or Joe McCarthy and Leo Feist or Leo Feist, Inc., of and concerning the copyright on, or the song entitled, [14] "That's How I Need You", or an assignment of any interest

therein, and if so, please produce a copy of all such agreements, and all correspondence between said parties of and concerning the same.

Interrogatory 11:

If you refuse or are unable to produce a copy of the documents referred to in Paragraph 10 above, please state what information you have concerning such contracts and the terms thereof and from whom you received such information, and if in writing, please produce such writing or a copy thereof.

Interrogatory 12:

State what stock ownership or other control your Company has in or over the corporation called Leo Feist, Inc., including the number of shares of said Leo Feist, Inc. owned by or held in behalf of your Company; the total number of similar shares outstanding of said Leo Feist, Inc., the names of the present Board of Directors and officers of Leo Feist, Inc.; the names of those nominated or selected by your Company.

Interrogatory 13:

State the date when the above shares were acquired by your Company and if and when your Company first nominated any directors or managing officers of said Leo Feist, Inc., and the names of such persons.

Interrogatory 14:

State what your Company records show concerning the approximate number of showings of the film called "Barnacle Bill" from its first show-

ing until some recent date agreeable to you; and state the approximate number of showings since July 25, 1941 to such date.

Interrogatory 15:

If you refuse or are unable to answer Question 14, please state your best estimate of the number of showings a film of the class and character of "Bar-nacle Bill" would receive after being marketed in the manner that this film has been marketed by your Company or in its behalf.

Interrogatory 16:

State whether your Company has in its possession, or under its control, original or copy of any assignment or assignments from Al Piantadosi to Leo [15] Feist, Inc., or Leo Feist, of any right, title or interest in the copyright, or right of renewal of copyright, or renewal copyright of the musical composition "That's How I Need You". If so, please produce a copy of such assignment or assignments.

Interrogatory 17:

If you refuse or are unable to produce copy of same, please state what information you have concerning the terms thereof and your source of information, and if such information is in writing, please produce such writing or a copy thereof.

J. M. DANZIGER,

Attorney for Plaintiff, Suite 1400 Continental
Building, 408 South Spring Street, Los Angeles,
California.

[Endorsed]: Filed Mar. 18, 1942. [16]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES
PROPOUNDED BY PLAINTIFF

State of California,
County of Los Angeles—ss.

Sam Katz, being first duly sworn, answers the Interrogatories Propounded by Plaintiff as follows:

Answer to Interrogatory 1:

My name and address are Sam Katz, Loew's Incorporated, Culver City, Calif. I am and have been a Vice-President of Loew's Incorporated and of Metro-Goldwyn-Mayer Corporation. In answering the remaining interrogatories, I make the within answers on behalf of these two companies and in reliance on their records and upon communications made to, and information given, me by various of their employees and officers. The scope of the [17] business of these companies was and is of such size and complexity that no one officer can have personal knowledge of all of their affairs and records or of the acts of all of their officers.

Answer to Interrogatory 2:

I am informed by employees of Loew's Incorporated having supervision of such matters, that there was and is a license between Leo Feist, Inc. and Loew's Incorporated concerning the song "That's How I Need You"; and that there is no such license with Metro-Goldwyn-Mayer Corporation. In the latter connection I state that Metro-Goldwyn-Mayer Corporation transferred all its

property and assets to Loew's Incorporated on December 31, 1937 and since that time has done no business and carried on no activities whatever.

Answer to Interrogatory 3:

Loew's Incorporated has in its custody copies of letters sent to Leo Feist, Inc. and originals of letters received from Leo Feist, Inc., which letters contain and evidence the terms upon which Loew's Incorporated was granted the right to use a song entitled "That's How I Need You" in a motion picture film called "Barnacle Bill", (which motion picture was at first tentatively entitled "The Water-front.") Copies of those letters are attached to the Affidavit of Abe Olman In Support of Motion For Summary Judgment heretofore filed herein and there respectively marked Exhibits E, F, G, H and I, which said copies are by this reference incorporated herein as though fully set forth. A copy of said affidavit has been served on plaintiff's counsel.

Answer to Interrogatory 4:

Answered by Answer to Interrogatory 3. [18]

Answer to Interrogatory 5:

Not answered because copies produced. See Answer to Interrogatory 3.

Answer to Interrogatory 6:

See Answer to Interrogatory 3. I am informed that on May 1, 1941 and May 2, 1941, Leo Feist, Inc., orally gave Loew's Incorporated the quotations referred to and confirmed in the letter of May 2, 1941, being Exhibit E of the letters re-

ferred to in my Answer to Interrogatory 3; and that the parties to these conversations were Abe Olman, secretary and general manager of Leo Feist, Inc., and Fred Raphael, an employee of Loew's Incorporated whose duties include the procuring of licenses for the use of musical numbers.

Answer to Interrogatory 7:

According to its records, Loew's Incorporated paid Leo Feist, Inc., as consideration for said license, the sum of \$515.64, which sum was paid on July 21, 1941 by check. Evidence of such payment is contained in a letter dated July 21, 1941 (being Exhibit H of the letters referred to in my Answer to Interrogatory 3) and a letter from Leo Feist, Inc., dated August 5, 1941, acknowledging payment, which letter is Exhibit I of the letters referred to in my Answer to Interrogatory 3. The two letters just referred to constitute the correspondence relating to this payment. A copy of the cancelled check evidencing such payment is attached hereto, marked Exhibit 1.

Answer to Interrogatory 8:

Loew's Incorporated has in its possession what purports to be a copy of the contract of employment between Leo Feist and Al Piantadosi, a copy of which is attached hereto [19] marked Exhibit 2. I am informed by our attorneys that a copy thereof was given to plaintiff's attorney on April 2, 1942.

Answer to Interrogatory 9:

Not answered because copy produced.

Answer to Interrogatory 10:

Loew's Incorporated has in its possession what purport to be copies of the following agreements or assignments, copies of which are attached hereto and marked respectively as indicated:

Exhibit 3—Assignment dated November 25, 1939, executed by Joe McCarthy;

Exhibit 4—Assignment dated November 25, 1939, executed by Joe Goodwin;

Exhibit 5—Assignment dated September 18, 1936, executed by Joe McCarthy;

Exhibit 6—Assignment dated September 28, 1936, executed by Joe Goodwin.

I am informed by our attorneys that copies of Exhibits 3 and 4 were given to plaintiff's attorney on April 2, 1942.

Answer to Interrogatory 11:

Not answered because copies produced.

Answer to Interrogatory 12:

Loew's Incorporated owns no stock in and has no control of Leo Feist, Inc. Loew's Incorporated does own 51% of the stock of Robbins Music Corporation which, I am informed, owns a controlling interest in Leo Feist, Inc. Loew's Incorporated, however, does not control Robbins Music Corporation for the reason that the stock which it owns does not permit it to [20] nominate or elect more than one-half of the members of the board of directors of Robbins Music Corporation, said Board consisting of four members. I do not know who the officers or directors of Leo Feist, Inc. are be-

yond the fact that I am informed that Abe Olman is secretary and general manager.

Answer to Interrogatory 13:

Not answered. See answer to Interrogatory 12.

Answer to Interrogatory 14:

See answer to Interrogatory 12.

Answer to Interrogatory 15:

This interrogatory cannot be answered for the reason that motion pictures are generally licensed to exhibitors for periods of one or more days with no restriction on the number of showings during any one or more days. The number of individual showings is, therefore, a matter for each exhibitor of whom there are several thousand and over whose records Loew's Incorporated has no control.

Answer to Interrogatory 16:

I am unable to make any estimate which would be sufficiently accurate to be of any value.

Answer to Interrogatory 17:

Loew's Incorporated has only a copy of the contract attached hereto as Exhibit 2.

Answer to Interrogatory 18:

See answer to Interrogatory 17.

SAM KATZ

Subscribed and sworn to before me this 22d day of June, 1942.

[Seal] **MARJORIE KING**

Notary Public

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Feb. 14, 1946. [21]

MARCUS LOEW BOOKING AGENCY, DISBURSING AGENT

LOEW BUILDING, BROADWAY AT 45TH ST., NEW YORK

14

PAY

VOUCHER NO.

DATE

TO THE ORDER OF

AMOUNT

95387 7/22/41

515 64

DO NOT DETACH ANY PART OF

~~ICK OR VOUCHERS~~

AMOUNT

TO
THE NATIONAL CITY BANK OF NEW YORK
TIMES SQUARE BRANCH
FOORTY-FIRST STREET AT BROADWAY
NEW YORK, N.Y.

• 100 •

On 2

[The original cancelled check has an accounting memorandum pasted on its face. For that reason it was necessary to take two views of the face of the check in order that all of the writing or printing appearing thereon might be visible in the photostat. The original check is available for inspection at the offices of defendant's counsel.]

EXHIBIT 1

23

MARCUS LOEW BOOKING AGENCY, DISBURSING AGENT

LOEW BUILDING, BROADWAY AT 45TH ST., NEW YORK

41

14

RECEIVED AND DEBITS

TO THE ORDER OF

5387 7/22/41

ITEM NO.	DATE	AMOUNT
		515 64

CHARGED IN THE PREVIOUS BALANCE AND
OUTSTANDING AT THE TIME THAT THE
CHARGE TICKET WAS SUBSTITUTED.

APPROVED
AUTHORIZED SIGNATURE

41

NO.	DATE	IN FULL SETTLEMENT OF THE FOLLOWING	
451	7/18	IN FULL TO COVER WORLD RIGHTS FOR THREE- "3" INSTRUMENTAL-PARTIAL USES- 34 38 EACH AND THREE VISUAL VOCAL PARTS USE AT 127 50 EACH OF COMPOSITION THATS HOW I NEED YOU BY PIANTADOSI PUBLISHER FEIST MUSIC & MEAN AS USED IN FEATURE FILM "CAROUSEL" FARMER CALLED "WATERCROFT" 15	

MAKE NO ALTERATIONS: RETURN IF NOT ACCEPTABLE

ENDORSEMENTS

THIS VOUCHER CHECK IS A PAYMENT IN
FULL OF THE WITHIN ACCOUNT, AND THE
PAYEE ACCEPTS IT AS SUCH BY ENDORSE-
MENT BELOW.

NO. OTHER RECEIPT NECESSARY.

Jack Mac C. O.
PAY TO THE ORDER OF
THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK
ROCKEFELLER CENTER BRANCH
LEO. FEIST, INC.

PAID
+6 +6 41
1·0·41

1·9·41
+8 +8 41
6W1D

38

Exhibit 1.

EXHIBIT No. 2

This Agreement made this 23rd day of August, 1909 between Leo Feist, Music Publisher, hereinafter described as the "Publisher", of the Borough of Manhattan, city of New York, party of the first part, and Al Piantadoso of the same place, hereinafter described as the "Composer" party of the second part, Witnesseth:

I. The Publisher hereby hires and employs the composer to write and compose operas, musical comedies, musical plays, songs and other musical compositions for a period of three years from the date hereof.

II. The Composer hereby accepts such employment and covenants and agrees to deliver to the Publisher any and all operas, musical comedies, musical plays, songs and other musical compositions, which the composer alone, or in conjunction with others, may write or compose during the period of three years, beginning on the date of this agreement, and the Composer grants and conveys to the Publisher the publishing rights, the rights to use for mechanical reproduction, and the copyright or copyrights with renewals, and the right to copyright and renew copyrights in any and all operas, musical comedies, musical plays, songs or other musical compositions, which he either alone or in conjunction with others may write during said period of three years, including the titles and every part thereof: and the Composer hereby expressly

covenants and agrees that the publishing rights, the right to use for mechanical reproduction and the copyright or copyrights with renewals of copyright, and the right to copyright and renew copyrights, in any and all operas, musical comedies, musical plays, songs or other musical [25] compositions said period of three years, shall immediately upon being written become and be the sole and absolute property of the Publisher, including the titles and every part thereof. And the Composer covenants and agrees not to write for or deliver to any person, firm or corporation, other than the Publisher, at any time during the said period of three years, any operas, musical comedy, musical plays, song or other musical composition, or the title or any part thereof, and not to grant to any person, firm or corporation, other than the Publisher, the publishing rights, the right to use for mechanical reproduction, the copyright or copyrights or renewals of copyright, or the right to copyright or renew copyrights in any operas, musical comedy, musical play, song or other musical composition, which during said period of three years he may write, either alone or in conjunction with others, and not to permit any such work or compositions so written by him, or the title or any part thereof, to be published, or to be used for mechanical reproduction by any person, firm or corporation, other than the Publisher, the Composer expressly covenants and agrees that he will not during the term of this agreement collaborate with any person in writing

any operas, musical comedy, musical play, song or other musical composition, except upon condition that the publishing rights, the rights to use for mechanical reproduction and the copyright, renewals of copyright, the right to copyright or renew copyrights in such work or composition shall be granted to and become the property of the publisher.

III. The Composer further agrees that he will write for and deliver to the Publisher not less than eight musical compositions during each year of the term of this agreement. The Publisher agrees to publish during each year of this [26] agreement not less than three of the compositions acquired from the Composer.

Fourth: The Publisher agrees to pay to the Composer the following royalties on account of the sale of copies of any work or composition which the Publisher shall acquire from the Composer in pursuance of this agreement, to wit:

One cent for each copy of all works or compositions sold at from 7 to 10 cents per copy;

Two cents for each copy of all works or compositions sold at 10 cents and up to 12 cents per copy;

Three cents for each copy of all works or compositions sold at from 12½ to 15 cents per copy;

Four cents for each copy of all works or compositions sold at more than 15 cents per copy.

A sum equal to one-half of the above royalties shall be paid for copies sold by the Publisher in

foreign countries; or when written in conjunction with another writer.

It Is Understood and Agreed that no royalties are to be paid for copies disposed of as new issues, or for professional or copies distributed for advertising purposes.

It Is Furthermore Understood and Agreed, that no royalties shall be paid for copies returned to the Publisher, for copies of any arrangement of any such work or composition for or to be used in connection with an orchestra or band or for the mandolin, zither or any other musical instrument, (excepting the piano or instruments for the mechanical reproduction of music,) or for any copies of any medley, book or other collective publication containing the whole or parts of the piano scores of any two or more such works or compositions whether sold in sheet, folio or book form [27] or otherwise, as to all of which aforesaid copies the Publisher shall have the exclusive right to print, sell or otherwise distribute or dispose of the same for his own benefit and behoof.

The Publisher agrees to pay to the Composer 25 per cent of all monies received by the Publisher from or on account of the use of any work or composition of the Composer for mechanical reproduction under the license of the Publisher.

Fifth: The Publisher further agrees to advance to the Composer on account of the royalties to be earned by him under this agreement the sum of Ten (\$10.00) Dollars per week for each week during

the first year of this agreement. The Publisher may deduct and retain the amount of all advance payments made to the Composer from the royalties accruing and becoming due to him. The Composer agrees that in case the advance payments made to him shall at the termination of this agreement be found to be in excess of the royalties then and until then earned by him, he will pay to the Publisher the amount received in excess.

Sixth: The Publisher agrees that he will render unto the said Composer semiannual statements between the 15th and 31st days of January and July of each year, showing all sales and the royalties earned by the said Composer, and will pay to him at the same time all the royalties due and owing to him.

Seventh: The Composer hereby declares and covenants that he is entirely free and has a good right to make this agreement; that he has not entered into any contract or agreement of any description which prevents him or could prevent him from carrying out in full the purposes of this contract. [28]

And the Composer further covenants and agrees to protect and to defend the right, title and interest of the Publisher to the fullest extent, in any opera, musical comedy, musical play, songs or any other musical compositions, which the said Publisher may acquire from the Composer.

Eighth: Each and every covenant in the fore-

going contract shall enure to the benefit of the Publisher, his Heirs, executors, administrators and assigns.

Ninth: It is Further Covenanted and Agreed that this agreement and the terms and conditions thereof may be extended at the option of the Publisher for an additional term of three years from the date of the expiration of the first term of this agreement, upon the Publisher giving to the Composer at least two months before the expiration of the term, notice of his intention to renew the contract, and upon the giving of such notice this agreement and every term and condition thereof shall remain in full force and effect for additional term of three years.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) AL PIANTADOSI, L. S.

(Signed) LEO FEIST, L. S.

In the presence of

(Signed) E. F. BITNER [29]

EXHIBIT No. 3

For and in Consideration of One Dollar and other good and valuable consideration, receipt whereof is hereby acknowledged, Joe McCarthy, for and on behalf of himself, and all other parties in interest

to the extent he is authorized to act for and on their behalf, hereby transfers, assigns and sets over to Leo Feist, Inc., all rights whatsoever in and to the musical compositions entitled:

If Every Star was a Little Pickaninny
I'm Sending a Message to Mama
Who's Goin' to do Your Lovin' When I'm Gone
Whose Loving Darling Are You
Your Daddy Did the Same Thing Fifty Years Ago

I'm Living Dear Just for You
Love is a Peculiarity
That's How I Need You
When I Get You Alone Tonight
At the Yiddisher Ball
Billy, Billy, Bounce Your Baby Doll
Be Sure He's Irish
Honey Rose
When Mother Plays a Rag Upon the Sewing Machine

There's Lots of Stations on My Railroad Track
Love, Honor and Obey
One Little Girl
When I Marry the One I Love

under the renewals and extensions of the copyrights therein and for and during every period in respect of which copyrights shall subsist beyond the date that the original term of copyrights in said works shall have first subsisted, together with any and all renewals and extensions of the copyrights therein.

In Witness Whereof, the said Joe McCarthy has executed this instrument and affixed his seal this 25th day of November, 1939.

JOE McCARTHY (L. S.) [30]

EXHIBIT No. 4

For and in consideration of \$1.00 and other good and valuable consideration, in hand paid, receipt whereof is hereby acknowledged, the undersigned, for and on behalf of himself (herself) and all other parties in interest, hereby transfers, assigns and sets over to Leo Feist, Inc., all rights whatsoever in and to the musical composition(s) entitled:

That's How I Need You

under the renewal and extension of the copyright(s) therein and for and during every period in respect of which copyright(s) shall subsist beyond twenty-eight years from the date that the copyright(s) in said work(s) shall have first subsisted.

In Witness Whereof, the undersigned has executed this instrument this 25th day of November 1939.

JOE GOODWIN (L. S.) [31]

EXHIBIT No. 5

That for and In Consideration of One Dollar and other good and valuable consideration from Leo Feist, Inc. (hereinafter referred to as "Feist"),

to Joe McCarthy, (hereinafter referred to as "McCarthy"), receipt whereof is hereby acknowledged, and of the premises, McCarthy, for and on behalf of himself, and all other parties in interest to the extent he is authorized or may become authorized to act for and on their behalf, hereby bargains, sells, transfers, assigns and sets over to Feist, everywhere, forever and without limitation, under the renewals and extensions of the copyrights to the musical compositions enumerated on Schedule A hereto annexed and made a part hereof, and for and during every period in respect of which copyrights shall subsist beyond the date that the copyrights in said works shall have subsisted for the original term thereof (hereinafter referred to collectively as "said compositions"), including without limitation, any and all renewals and extensions of the copyrights in and to said compositions throughout the world and the sole and exclusive right in Feist of ownership, use, publication and sale, as the sole owner and proprietor thereof throughout the world, and the sole and exclusive right to renew and extend the copyrights subsisting in said compositions and to make application therefor and to register the same in the name of McCarthy or Feist and any and all co-writers and composers thereof as in such case made and provided, together with each and every right and use to which said compositions and each and every part, arrangement and form thereof can or may be put, and any and all benefits, ad-

vantages, income, revenue, royalties, fees and rights of any and every nature, kind and description whatsoever, derived and derivable, accrued or which may, might or shall hereafter accrue, in any and all parts of the world, directly and indirectly from any and every use and purpose thereof whatsoever, and from any and every contract, agreement, right, privilege, grant and license in respect thereof, whether now or hereafter known or in existence, and whether within the contemplation of the parties or not, and from the literary and musical property therein, together with the sole right, power and authority to make any and all versions, omissions, additions, changes, substitutions and adaptations in and to said compositions, the titles, words and music thereof, and any and every part and parts thereof, provided, however, McCarthy reserves to himself the sole and exclusive right to license the recording for motion picture use throughout the world, of the musical compositions only comprising the scores of the productions entitled "Irene", "Rio Rita", "Kid Boots" and "Up She Goes", and to collect and receive all moneys accruing from such rights to such musical compositions comprising said scores, and further provided that no right is granted or conveyed to give any stage presentation of the said musical comedies entitled "Irene", "Rio Rita", "Kid Boots" and "Up She Goes". [32]

That in consideration of and subject to Feist acquiring the rights to said compositions as in this

instrument provided, Feist shall pay or cause to be paid the compensation and remuneration as royalties and fees specified in said Schedule A annexed, to McCarthy (and to such other party or parties in interest designated in said Schedule A from whom Feist shall acquire the rights in said compositions as in this instrument provided), being the total compensation and remuneration payable by Feist for any and all rights acquired by Feist in said compositions from any and all parties in interest.

That in further consideration of Feist acquiring the rights to said compositions as in this instrument provided, Feist has paid to McCarthy upon the execution of this instrument, the sum of Three Thousand (\$3,000.) Dollars, receipt whereof is hereby acknowledged, which shall be on account and in advance of all moneys whatsoever to become payable under both this instrument and any and all prior agreements affecting said compositions for the original terms of copyrights thereof as royalties and fees. That Feist shall not be obligated for the payment of any other moneys in respect to said compositions on and after the date hereof until it shall have first recouped the amount of said advance payment from the moneys as royalties and fees first becoming due on and after the date hereof under both this instrument, and any and all prior agreements affecting said compositions for the original terms of copyrights thereof.

That in respect of each of said compositions that shall be published by Feist during the copyright renewal period, for such time as royalties and fees shall accrue hereunder in respect thereof, Feist shall render or cause to be rendered, statements and shall make or cause to be made payment to McCarthy (and to such other party or parties in interest designated in said Schedule A from whom Feist shall acquire the rights in said compositions as in this instrument provided), for such royalties and fees specified within sixty days after December 31st and June 30th respectively of each year for each such preceding semi-annual period (after the advance shall have been earned from all moneys to become payable under this instrument and all prior agreements affecting said compositions).

Feist shall have the right to grant, license, transfer, assign, sell and dispose of any and all rights acquired under this instrument. McCarthy undertakes and agrees to make, execute and deliver and procure the making, execution and delivery of any and all further instruments, documents and writings that shall be requested by Feist and its successors, assigns and licensees, for the purpose of perfecting and confirming any and all rights acquired by Feist hereunder, and McCarthy hereby nominates and appoints Feist and its each and every successor, assign and licensee, the true and lawful attorney of McCarthy and all other parties in interest, to make, execute and deliver any and all such instruments, documents and writings in

the name of McCarthy and such other parties in interest, this power being coupled with an interest and irrevocable.

That as an inducement to Feist to pay the consideration provided and to exercise the rights under this instrument, [33] McCarthy warrants and represents: That he is the author of the words of said compositions as designated in Schedule A; that he and/or Feist has the right to renew and extend the copyrights in said compositions; that said compositions and each and every part thereof are original and do not infringe upon any other musical compositions, numbers, works or material, and that said compositions are not in the public domain; that he has never bargained, sold, assigned, transferred, hypothecated, pledged or encumbered any right, title or interest in or to the renewal or extension of the copyrights in said compositions or in or to said compositions under the renewal or the extensions of the copyrights therein, or the right of renewal or extension thereof (other than under any prior agreements with Feist). That in the event any claim is made in respect of any of said compositions or the renewal or extension of the copyrights therein, then every obligation of payment hereunder shall cease and terminate until action shall be brought by every such claimant and every such claim finally disposed of and adjudicated. Feist and its successors in interest shall have the right, in its or their discretion, to employ counsel in respect of any and all such claims and to prosecute and defend

any and all actions and proceedings that it or they, in its or their sole discretion, may deem advisable, and to settle all such claims, before or after suit, for such amounts and upon such terms as it or they may, in its or their sole discretion, deem advisable; McCarthy to indemnify and hold Feist and its successors in interest harmless by reason of all of the foregoing.

In Witness Whereof, Joe McCarthy has executed this instrument and affixed his seal this 18 day of September, 1936.

JOE McCARTHY (L. S.)

Sept 18th 1936 [34]

Schedule A

(1) The total compensation and remuneration payable by Feist as royalties and fees in any event (one-half of which shall be payable to McCarthy where there are two writers and composers, and one-third of which shall be payable to McCarthy where there are three writers and composers, the payment to such other writers and composers, being conditioned upon Feist acquiring their respective interests in said compositions for the renewal and extended periods of copyright, as in the foregoing instrument provided), in respect to the following compositions, are, viz:

3c for each regular pianoforte copy of said compositions sold, paid for and not returned, in the United States and Canada; 33-1/3% of all moneys received by Feist from the United States and Canada, for its own

use and benefit, from the mechanical reproduction of said compositions for phonograph records and music rolls and from the recording of electrical transcriptions;

33-1/3% of all moneys received by Feist for its own use and benefit from the licensing of said compositions for recording for motion picture and television use; and
33-1/3% of all earned royalties and fees received by Feist from the sale of pianoforte copies and the mechanical reproduction of said compositions for phonograph records, music rolls and electrical transcriptions, from publishers authorized by Feist, outside of the United States and Canada.

Words—Joe McCarthy Music—Al Piantadosi
Funny Moon
In All My Dreams I Dream of You
Mother's Child
San Francisco Glide
That Dreamy Italian Waltz
That *Todelo* Tune
Give Me a Small Town Sweetheart
Honey Man—My Little Lovin' Honey Man
I Just Met the Fellow That Married the Girl I
Was Going to Get
Somehow I Can't Forget You
Summer Days
That Long Lost Chord
When Broadway Was a Pasture

At the Yiddisher Ball (Harry Piani)
Love Is a Peculiarity
Who's Goin' to Do Your Lovin' When I'm Gone
I've Loved You Since You Were a Baby
I'm Looking for Antone
I'm Sending a Message to Mama [35]
* That's How I Need You * *

EXHIBIT No. 6

That For and in Consideration of One Dollar and other good and valuable consideration from Leo Feist, Inc. (hereinafter referred to as "Feist"), to Joseph Altschuler also known as Joe Goodwin, residing at 1335 North Gordon Street, Hollywood, Calif., (hereinafter referred to as the "Writer"), receipt whereof is hereby acknowledged, and of the premises, the Writer, on behalf of himself and all other parties in interest, hereby bargains, sells, transfers, assigns and sets over to Feist, everywhere, forever and without limitation, under the renewals and extensions of the copyrights, to all the musical compositions wholly or partly written and/or composed by the Writer alone or in collaboration with one or more other writers and/or composers, the publication rights to which were at any time heretofore acquired by Feist, and including without limitation and among all others the partial list of such musical compositions enumerated on Schedule A hereto annexed and made a part hereof, and any and all other editions and publications embodying the whole or any material

part of the title, words or music thereof or issued under the same, like or similar title, and for and during every period in respect of which copyrights shall exist beyond twenty-eight years from the date that the copyrights in said works shall have first subsisted (all of which are hereinafter referred to as "said compositions"), including without limitation, any and all renewals and extensions of the copyrights in and to said compositions throughout the world and the sole and exclusive right of ownership, use and publication and sale, as the sole owner and proprietor thereof throughout the world, and the sole and exclusive right to renew and extend the copyrights subsisting in said musical compositions and to make application therefor and to enter and register the same in the name of the Writer and any and all co-writers and/or composers thereof, together with each and every right and use to which said compositions and each and every part, arrangement and form thereof, can or may be put, and any and all benefits, advantages, income, revenue, royalties, fees and rights of any and every nature, kind and description whatsoever, derived and derivable, accrued or which may, might or shall hereafter accrue, in any and all parts of the world, directly and indirectly, from any and every use and purpose whatsoever, and from any and every contract, agreement, right, privilege, grant and license in respect thereof, whether now or hereafter known or in existence and whether within the contemplation of the parties or not, and from the literary and musical property therein, together

with the sole right, power and authority to make any and all versions, omissions, additions, changes, substitutions and/or adaptations in and to said compositions, the titles, words and music thereof, or any and every part or parts thereof.

That subject to the warranties and representations contained herein being true, Feist shall pay, or cause to be paid, the sums of money as the total royalties and fees for and on behalf of all parties in interest as, or through, the writers and composers of said compositions, designated on said Schedule A hereto annexed; it being specifically understood and agreed anything to the contrary notwithstanding, that the sums designated on said Schedule A as payable in respect of each of said compositions, represent the total amount payable by Feist in any event as to each of said com- [36] positions, and if any other or different interests appear, then such total amount payable as to each of said compositions, shall be pro-rated and paid as all interests shall appear. That anything to the contrary notwithstanding, there shall be no obligation of Feist to require the payment of any compensation or any amount of compensation, for the licensing of the recording and/or performance of said compositions for motion picture use.

That in further consideration of the rights acquired by Feist under this instrument, and in reliance upon the truth of the warranties and representations therein contained, Feist has paid to the Writers upon the execution of this instrument, the sum of \$250.00, receipt whereof is hereby

acknowledged, which shall be on account and in advance of all moneys to become payable as royalties and fees in respect to said compositions. That Feist shall not be obligated for the payment of any royalties or fees in respect to said compositions until it has first recouped the amount of such advance payment and all other moneys loaned or advanced to the Writers and/or all other parties in interest in said compositions, whether in respect to said compositions or otherwise.

That in respect of each of said compositions that shall be published by Feist during the copyright renewal period, for such time as royalties and fees shall accrue hereunder, Feist shall render, or cause to be rendered, statements and make, or cause to be made, payment to the Writer and such other party or parties in interest, for such royalties and fees as in this instrument provided, within a reasonable time after March 1st and September 1st of each year for the preceding semi-annual periods ending December 31st and June 30th respectively.

Feist shall have the right to grant, license, transfer, assign, sell and dispose of any and all rights acquired under this instrument.

The Writer undertakes and agrees, to make, execute and deliver and to procure the making, execution and delivery, of any and all further instruments, documents and writings that shall be requested by Feist or its successors or assigns, for the purpose of perfecting and confirming any and all rights acquired by Feist hereunder, and the Writer hereby nominates and appoints Feist and its each

and every successor and assign, the true and lawful attorney of the Writer and all other parties in interest, to make, execute and deliver any and all such documents and writings in the name of the Writer, and/or all other parties in interest, this power being coupled with an interest and irrevocable.

That as an inducement to Feist to enter into this agreement and to make the payments provided, the Writer warrants and represents: that the Writer is the co-author and/or co-composer of the words and/or music of all of said compositions; that the writer and/or Feist have the sole right to renew and extend the copyrights in said compositions; that said compositions and each and every part [37] thereof are original and do not infringe upon any other musical compositions, numbers, works or material, and that neither said compositions nor any parts thereof are in the public domain; that the Writer has the full right, power and authority to enter into this agreement for and on behalf of the writer and all other parties in interest whatsoever; and that no right, title or interest in or to the renewal or extension of the copyrights in said compositions, or in or to said compositions under the renewal or extension of the copyrights therein, or the right of renewal, or extension thereof (other than under prior agreements with Feist) has ever been bargained, sold, assigned, transferred, hypothecated, pledged or incumbered by the writer or any other party or parties in interest. That in the

event any claim or demand is made in respect to any of said compositions or the renewal or extension of the copyrights therein, then every obligation of payment hereunder shall cease and terminate until action shall be brought by every such claimant and/or every such claim finally adjudicated and disposed of. Feist and its successors, in interest, shall have the right, in its or their discretion, to employ counsel in respect of any and all such claims and demands and to prosecute and defend any and all actions and proceedings that it or they in its or their sole discretion, may deem advisable and to settle and pay any and all such claims and demands before or after suit for such amounts and upon such terms as it or they may, in its or their sole discretion, deem advisable; the writer and such other parties in interest aforesaid shall indemnify and hold Feist and its successors in interest harmless by reason of all the foregoing and be liable to them and each of them for the payment of any and all obligations and expenditures arising out of the same.

In Witness Whereof, the writer has executed this instrument and affixed his seal this 28th day of September 1936.

JOE GOODWIN (L. S.)

Joseph Altschuler under
pseudonym of Joe Goodwin
LEO FEIST, INC.

By ABE OLMAN,
Vice-President. [38]

SCHEDULE A

Title	Writers and Composers				
He's On a Boat That Sailed					
Last Wednesday	Joe Goodwin and Lew Brown				
I'm Afraid I'm Beginning to Love You	.. .. .. .. ..			
Kiss Me Good-Night	.. .. .. .. ..			
The Ragtime Dream	.. .. .. .. ..			
One Little Girl	.. .. .. Joe McCarthy				
How Late Can You Stay Out Tonight	Joe Goodwin — Fred Fisher				
In My Beautiful, Beautiful Dreams	.. .. — Oreste Migliaccio				
Won't You Give Me a Chance to Love You	.. .. — James V. Monaco				
Brass Band Ephraham Jones	.. .. — George W. Meyer				
It's My Business to Know Them All —				
Sweetie Sweet	" " —				
Haven't You Forgotten Something Dearie	.. .. — Al Piantadosi				
When You Play in the Game of Love —				
I Don't Care Whose Girl You Were	.. .. — W. Raymond Walker				
Ireland Never Seemed So Far Away —				
Stop It or You'll Be Too Late —				
You Broke My Heart to Pass the Time Away	Leo Wood — Joe Goodwin				
At the Midnight Masquerade	Lew Brown & Joe Goodwin — Nat D. Ayer				
Lonesome Baby —				
That Little German Band	Joe McCarthy & Joe Goodwin — Fred Fisher				
When I Get You Alone Tonight —				

Schedule A—(Continued)

Title	Writers and Composers				
Any Boy Could Love a Girl	"	"	—	Al Piantadosi	"
Like You					
Cute and Cunning Wonder-	"	"	—	"	"
ful Baby Doll					
Melinda's Wedding Day	"	"	—	"	"
That's How I Need You					
(c) 5/16/12	"	"	—	"	"
Then I'll Stop Loving You	"	"	—	"	"
When I Marry the One					
I Love	Joe McCarthy &				
	Joe Goodwin — Al Piantadosi				
Whose Loving Darling					
Are You	"	"	—	"	"
Your Daddy Did the Same					
Thing Fifty Years Ago	"	"	—	"	"
Oo-ga-lee-oo-ga-lee-oo	Edgar Leslie &				
	Joe Goodwin — "				
Where Was Moses When the					
Lights Went Out	"	"	—	"	"
Honey Rose	Joe McCarthy &				
	Joe Goodwin — Chris Smith				
Love Honor and Obey					
When Mother Plays a Rag	"	"	—	"	"
Upon That Sewing					
Machine	"	"	—	"	"
Oh So Sweet	"	"	—	"	"

The following sums of money are the total royalties and fees payable by Feist in respect to the hereinbefore entitled compositions, each * * *

[Endorsed]: Filed Jun. 23, 1942. [39]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT IN FAVOR OF DEFENDANTS

To: Plaintiff above-named and to his Attorney of Record.

You and each of you will please take notice that

on June 29, 1942, at 10:00 o'clock a. m., or as soon thereafter as counsel may be heard, defendants Loew's Incorporated and Metro-Goldwyn-Mayer Corporation will move the above-entitled court, in courtroom 1 thereof, for a summary judgment herein in favor of said defendants.

Said motion will be made upon the following, and separately upon each of the following, grounds, to wit:

1. There is no genuine issue as to any material fact herein;
2. Each of the moving defendants is entitled to judgment as a matter of law; [40]
3. The facts establish as a matter of law that neither of said defendants has infringed the copyright which is the subject of the action.

Said motion will be based upon this notice of motion, upon the pleadings herein, upon the affidavits of E. J. Mannix and Abe Olman filed herewith, and upon all the files, papers and records herein.

Dated: June 16, 1942.

LOEB and LOEB
By HERMAN F. SELVIN

Attorneys for moving defendants

[Endorsed]: Filed Jun. 16, 1942. [41]

[Title of District Court and Cause.]

AFFIDAVIT OF ABE OLMAN IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

State of New York

County of New York—ss.

Abe Olman, being duly sworn, deposes and says:

I am over the age of twenty-one years and in full possession of all my faculties. I have personal knowledge of the facts herein below stated.

I am, and since on or about October 25, 1935, I have been, secretary and general manager of defendant Leo Feist, Inc., a corporation, and I am, and since on or about October 4, 1937, I have been secretary and general manager of Robbins Music Corporation, a corporation affiliated with said Leo Feist, Inc. During said period that I have been secretary and general manager of said Leo Feist, Inc., I have familiarized myself with all of the records of said Leo Feist, Inc.

The records of said Leo Feist, Inc. disclose that the musical composition entitled "That's *Why I Need You*", written by plaintiff Al Piantadosi in collaboration with Joe McCarthy and Joe Goodwin, (the subject matter of the first cause of action of the first amended complaint herein) was copyrighted by Leo Feist, an individual, (who as the predecessor in interest of said Leo Feist, Inc. was then conducting a music publishing business under his name) as the proprietor thereof (*an* an employer for whom said work had been made for

hire by plaintiff Al Piantadosi and by virtue of assignments from Joe McCarthy and Joe Goodwin, the co-authors thereof) by his [42] publication thereof on May 16, 1912 with the notice of copyright required by the Copyright Act and that he obtained registration in his name of his claim to said copyright therein in the office of the Register of Copyrights, Washington, D. C. on May 17, 1912, Entry: Class E, XXc., No. 284725, by complying with the provisions of the Copyright Act, including the deposit of copies, and that thereupon the Register of Copyrights issued to him the certificate provided for in section fifty-five of said Act. A true, correct and complete photostatic copy of said certificate is attached hereto, marked Exhibit A and by this reference incorporated herein as though fully set forth.

The records of said Leo Feist, Inc. disclose that on or about June 25, 1912 the said Leo Feist, Inc. succeeded to said music publishing business of said Leo Feist and to all the property, assets and records thereof, including among all other things said musical composition entitled "That's *Why* I Need You" and all rights and interest therein and thereto and in the copyright therein and all records of said Leo Feist relating to said musical composition, and ever since said Leo Feist, Inc. has been and now is the sole owner thereof.

On May 22, 1939 and within one year prior to the expiration of said original term of copyright in said musical composition entitled "That's *Why*

I Need You", said Leo Feist, Inc. obtained a renewal and extension of the copyright therein both in its name as proprietor (by reason of the copyright having been originally secured by its predecessor in interest as an employer for whom said work had been made for hire) and for, on behalf of and in the names of Joe McCarthy and Joe Goodwin as the authors of the words thereof, by making application therefor to the said Copyright Office, which application was thereupon duly registered therein on May 22, 1939, [43] renewal registration No. 76764, as provided by section twenty-three of said Act. A true, correct and complete photostatic copy of the certificate of the Register of Copyrights of said registration thereof is attached hereto, marked Exhibit B and by this reference incorporated herein as though fully set forth.

Thereafter and on and under date of November 25, 1939, the said Joe McCarthy executed and delivered to said Leo Feist, Inc. a written assignment of all of his rights whatsoever in and to said musical composition entitled "That's *Why I Need You*" under said renewal and extension of copyright therein and for and during the period of said renewal and extension of copyright *therein and for and during the period of said renewal and extension of the copyright* therein. A true, correct and complete photostatic copy of said assignment is attached hereto, marked Exhibit C and by this reference incorporated herein as though fully set forth. I am familiar with the signature of said Joe McCarthy appearing on the original

of said assignment, which signature is in fact the signature of said Joe McCarthy.

Thereafter and on and under date of November 25, 1939, the said Joe Goodwin executed and delivered to said Leo Feist, Inc. a written assignment of all his rights whatsoever in and to said musical composition entitled "That's *Why* I Need You" under said renewal and extension of copyright therein and for and during the period of said renewal and extension of the copyright therein. A true, correct and complete photostatic copy of said assignment is attached hereto, marked Exhibit D and by this reference incorporated herein as though fully set forth. I am familiar with the signature of said Joe Goodwin appearing on the original of said assignment, which signature is in fact the signature of said Joe Goodwin. [44]

Thereafter said Leo Feist, Inc., as the proprietor of the renewal copyright therein, licensed and consented to the use by defendant Loew's Incorporated (referred to in the first cause of action of the first amended complaint herein) of said musical composition entitled "That's *Why* I Need You" in the motion picture production of Loew's Incorporated entitled "Barnacle Bill", formerly entitled "The Waterfront". Said license is evidenced by the following communications:

Dated May 2, 1941, from Fred Raphael of said Loew's Incorporated to deponent.

Dated July 3, 1941, from said Fred Raphael to deponent.

Dated July 16, 1941, from deponent to said Fred Raphael.

Dated July 21, 1941, from said Fred Raphael to deponent.

Dated August 5, 1941, from Paul Vrablic of said Leo Feist, Inc. to said Fred Raphael.

A true, correct and complete copy of each of said communications is attached hereto, marked respectively Exhibit E, Exhibit F, Exhibit G, Exhibit H and Exhibit I, and by this reference incorporated herein as though fully set forth. In said communications Feist Music Company refers to said Leo Feist, Inc., Robbins Music Company refers to said Robbins Music Corporation, said Paul Vrablic then was and still is the accountant of said Leo Feist, Inc. and said Fred Raphael then was and still is an employee of said Loew's Incorporated. I am familiar with the signatures of said Paul Vrablic and Fred Raphael appearing on the originals of said communications, which signatures together with my signature are in fact the signatures of the persons whose signatures [45] they purport to be.

ABE OLMAN

Subscribed and sworn to before me this 9th day of June, 1942.

[Seal] WILLIAM LIEBER

Notary Public in and for the County of New York, State of New York. William Lieber, Notary Public N. Y. Co. Clk's No. 387, Reg. No. 3 L 554. Commission expires March 30, 1943.

No. 17409

State of New York,
County of New York—ss.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, the same being a Court of Record having by law a seal, do hereby certify, that William Lieber whose name is subscribed to the annexed deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for said County, duly commissioned and sworn and qualified to act as such and authorized by the laws of the State of New York to protest notes, to take and certify depositions, to administer oaths and affirmations and certify the acknowledgment or proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this State. And further, that I am well acquainted with the handwriting of such Notary Public, or have compared the signature of such officer with his autograph signature filed in my office, and believe that the signature to the said annexed instrument is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 10 day of June, 1942.

[Seal] ARCHIBALD R. WATSON
County Clerk and Clerk of the Supreme Court,
New York County. [46]

EXHIBIT A

Leo. Feist, New York, N. Y. Title of music:

That's How I Need You. Words by Joe McCarthy and Joe Goodwin. Music by Al. Piantadosi.

Copies received May 17, 1912. Date of publication May 16, 1912.

Entry: Class E, XXc., No. 284725

[Seal] THORVALD SOLBERG

Register of Copyrights.

EXHIBIT B

The copyright is claimed by the Proprietor of Copyright in a work made for hire (A Piantadosi) and The Authors of Words.

The work is described as a Musical Composition and is entitled *That's How I Need You.* Words by Joe McCarthy & Joe Goodwin. Music by Al Piantadosi.

The date of original publication was May 16, 1912. Entry no. Exxc 284725

Application filed May 22, 1939. Renewal registration no. 76764

[Seal] C. L. BOUVE

Register of Copyrights. [47]

EXHIBIT C

For and in Consideration of One Dollar and other good and valuable consideration, receipt

whereof is hereby acknowledged, Joe McCarthy, for and on behalf of himself, and all other parties in interest to the extent he is authorized to act for and on their behalf, hereby transfers, assigns and sets over to Leo Feist, Inc., all rights whatsoever in and to the musical compositions entitled:

If Every Star Was a Little Pickaninny

I'm Sending a Message to Mama

Who's Goin' to Do Your Lovin' When I'm
Gone

Whose Loving Darling Are You

Your Daddy Did the Same Thing Fifty Years
Ago

I'm Living Dear Just for You

Love Is a Peculiarity

That's How I Need You

When I Get You Alone Tonight

At the Yiddisher Ball

Billy, Billy, Bounce Your Baby Doll

Be Sure He's Irish

Honey Rose

When Mother Plays a Rag Upon the Sewing
Machine

There's Lots of Stations on My Railroad Track

Love, Honor and Obey

One Little Girl

When I Marry the One I Love

under the renewals and extensions of the copyrights therein and for and during every period in respect of which copyrights shall subsist beyond the date

that the original term of copyrights in said works shall have first subsisted, together with any and all renewals and extensions of the copyrights therein.

In Witness Whereof, the said Joe McCarthy has executed this instrument and affixed his seal this 25th day of November, 1939.

JOE McCARTHY (L. S.) [48]

EXHIBIT D

For and in consideration of \$1.00 and other good and valuable consideration, in hand paid, receipt whereof is hereby acknowledged, the undersigned, for and on behalf of himself (~~herself~~) and all other parties in interest, hereby transfers, assigns and sets over to Leo Feist, Inc., all rights whatsoever in and to the musical composition(s) entitled:

That's How I Need You

under the renewal and extension of the copyright(s) therein and for and during every period in respect of which copyright(s) shall subsist beyond twenty-eight years from the date that the copyright(s) in said work(s) shall have first subsisted.

In Witness Whereof, the undersigned has executed this instrument this 25th day of November 1939.

JOE GOODWIN (L. S.) [49]

EXHIBIT E

METRO-GOLDWYN-MAYER PICTURES

Distributed by Loew's Incorporated
Loew Building—1540 Broadway
New York

May 2, 1941

Mr. Abe Olman
Feist Music Company
50th & Broadway
New York City.

Dear Abe:

This is to confirm the following quotations which you granted me for the use of the composition "That's How I Need You" by Piantadosi, in the picture "Waterfront".

On May 1st, nine hundred dollars (\$900.) for unlimited use.

On May 2nd, one hundred eighty-seven dollars (\$187.) each visual vocal use, and thirty seven dollars and fifty cents (\$37.50) for each background instrumental use.

Very truly yours,

FRED RAPHAEL. [50]

EXHIBIT F

METRO-GOLDWYN-MAYER PICTURES

Distributed by Loew's Incorporated

Loew Building—1540 Broadway
New York

July 3, 1941.

Mr. Abe Olman
Robbins Music Company
799 Seventh Avenue
New York, N. Y.

Dear Abe:

Recently we received quotations from you, as follows, in connection with the use of the composition "That's How I Need You", in our picture "Waterfront":

Instrumental nonvisual partial.....\$37.50

Visual vocal partial.....187.00

The Studio has made six (6) uses of this number—three (3) instrumental nonvisual partial, and three (3) visual vocal partial. These uses total \$673.50.

In view of the number of uses made, is there any way we can get a reduction on the visual vocal?

Very truly yours,

FRED RAPHAEL. [51]

EXHIBIT G

LEO FEIST, INC.

Music Publishers

1629 Broadway, New York, N. Y.

Circle 6.2939. Cable. Feistel

July 16, 1941

Mr. Fred Raphael
Loew's Incorporated
1540 Broadway
New York, N. Y.

Dear Fred:

Answering yours of July 3rd concerning the use of "That's How I Need You" in the M-G-M picture "Waterfront", in view of the six uses made in this film, we will reduce the quotation to:

visual vocal partial	\$137.50 per use
partial background inst.	34.38 per use

This makes a total of \$515.64 for three of each type uses, of which we will pay \$375.00 to the writers and \$140.64 to the foreign publisher.

I trust this will be satisfactory.

Kindest regards.

Sincerely yours,

LEO FEIST, INC.

(Signed) ABE OLMAN. [52]

EXHIBIT H

METRO-GOLDWYN-MAYER PICTURES

Distributed by Loew's Incorporated

Loew Building—1540 Broadway

New York

July 21, 1941

Mr. Abe Olman

Feist Music Company

1629 Broadway

New York City

Re: Payment due on feature "Barnacle Bill" formerly entitled "The Waterfront"

Dear Abe:

In accordance with permission granted us by you on May 2nd, 1941 and July 16, 1941 we are herewith enclosing our check as follows:

3 instrumental partial nonvisual uses @

\$34.38 \$103.14

3 visual vocal partial uses @ \$137.50..... 412.50

Composition: "That's How I Need You" by

Piantadosi, Amount: \$515.64 for World

Rights.

Kindly acknowledge receipt of this payment for the writers and foreign publisher.

Very truly yours,

FRED RAPHAEL.

EXHIBIT I

LEO FEIST, INC.

Music Publishers

1629 Broadway, New York, N. Y.

Circle 6.2939. Cable. Feistel

August 5, 1941

Mr. Fred Raphael

Loew's Inc.

1540 Broadway

New York, N. Y.

Dear Sir:

We acknowledge receipt of your check, in the amount of \$515.64, covering

3 instrumental partial nonvisual uses @ \$34.38.

3 visual vocal partial uses @ \$137.50.

of the composition "That's How I Need You"
by Piantadosi, used in the production "The
Waterfront".

Amount:\$515.64 for World Rights

Very truly yours,

LEO FEIST, INC.

(Signed) PAUL VRABLIC.

PV:MA

[Endorsed]: Filed Jun. 16, 1942. [54]

[Title of District Court and Cause.]

AFFIDAVIT OF AL PIANTADOSI AGAINST
MOTION FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

Al Piantadosi, being duly sworn, deposes and says:

That I am the plaintiff in this action and competent as a witness, and if sworn could and would testify as a witness in the manner following.

That about the year 1909, I entered into a contract with Leo Feist and I do not have a copy of said contract. From my memory of its contents, I deny that the terms of the written contract between myself and Leo Feist were similar to a purported copy of such contract referred to in the Answers to Interrogatories in this case and copy of which alleged contract has heretofore been given to my attorney, and I deny that the terms of any such contract made the said Feist the proprietor of said musical composition That's How I Need You, or any part thereof, or that the said musical composition, or any part thereof was made by me for hire, and, or, for said Leo Feist as an employer. I deny that said contract in any way concerned any synchronization rights to said musical composition as such an art was unknown in the year 1909; and I deny that said contract granted to said Feist [55] the right to copyright said musical composition, or any part thereof, except as Trustee for myself. I

deny that said contract granted to said Feist any rights at all under or in any renewal copyright, or the right to renew the same in my name, or at all; and deny that said contract granted Feist any renewal rights in said copyright so far as it concerns any synchronization rights.

That said Leo Feist filed an application for copyright on said musical composition during May 1912 and that he received a certificate from the copyright office set out in the affidavit of Olman herein marked Exhibit A.

That some time prior to May 22, 1939, Leo Feist, Inc. filed some form of application with the Registrar of Copyrights, concerning said musical composition and received from the said Registrar of Copyrights a certificate in the form attached to the Olman affidavit, marked Exhibit B, and deny that said Feist had any right to make said application.

That I know of my own knowledge that the documents attached to the Olman affidavit, marked Exhibits C and D and purporting to be signed by Joe Goodwin and Joe McCarthy on November 25, 1939 were not executed on that date, and that the consideration therefor was not paid on such date, but that the same were executed on the 18th and 28th day of September, 1936, the dates when other contracts were made with said McCarthy and Goodwin as appear from Exhibits 3 and 4 to the Answers to Interrogatories herein. That said McCarthy and Goodwin are both at present outside the State of

California and have been so since the Notice of Motion for Summary Judgment has been served herein and I am therefore unable to obtain affidavits from them as to these facts.

That my knowledge of when the said contracts were executed comes to me from conversations had with said McCarthy and Goodwin at various times and from information given to me by letters from Leo Feist, Inc., set out in Exhibit "A", Page 14, Page 12, Page 9, Page 11, thereof, and from a letter received from said McCarthy under date of March 23, 1942 wherein he said, among other things, "I re-signed my copyrights with Feist about five years ago." This letter was in response to one of my own to McCarthy inquiring as to exact date of his conveyance of copyrights to Leo Feist, Inc.

That I deny that Joe McCarthy and Joe Goodwin, either separately or [56] together ever made application for or obtained a renewal of the copyright on the musical composition That's How I Need You, or any part thereof.

That during the year 1936 and continuing until June, 1938, Leo Feist, Inc. through Abe Olman and other officers, and myself, had negotiations concerning the proposed acquisition by Leo Feist, Inc. of the renewal copyrights on the said musical composition and others of my compositions, and that said negotiations were almost entirely by correspondence and I attach hereto copies of all such correspondence, marked Exhibit "A" and made a part hereof.

That during said negotiations said Leo Feist, Inc. submitted to me a proposed contract which I did not execute, and attached hereto is a copy of the same, marked Exhibit "B" and made a part hereof.

That during the early part of January 1942, I received from Leo Feist, Inc. a "Statement of Royalties" dated December 31, 1941 and attached hereto is a photostatic copy of same, marked Exhibit "C" and made a part hereof.

That upon receipt of same I gave said Statement to my attorney, Mr. J. M. Danziger, and he wrote to said Leo Feist, Inc. under date of February 26, 1942, Mar. 16, 1942 and March 25, 1942, and he received letters from Leo Feist, Inc. under date of March 10, 1942 and March 20, 1942, copies of which are hereto attached marked Exhibit "D" and made a part hereof.

That I deny that Leo Feist, Inc. have at any time licensed to defendant Loew's Incorporated, the said musical composition That's How I Need You, or the right to use the same or any part thereof; or of any of my rights in the same, or any part thereof. That Loew's Incorporated were notified by letter of the infringement herein referred to on July 25, 1941.

That the infringement by defendants of the copyright of said musical composition That's How I Need You, took place before May 1, 1941, by the manufacture and public exhibition and sale of the use of the film "Barnacle Bill", such manufac-

ture, sale and public exhibition taking place during the months preceding May, 1941.

AL PIANTADOSI.

Subscribed and sworn to before me this 30th day of June, 1942.

[Seal]

H. A. ANDREWS,

Notary Public in and for said
County and State. [57]

* * * * *

EXHIBIT "C"

Leo Feist Inc.

1629 Broadway : New York

STATEMENT OF ROYALTIES

To December 31, 1941

Al Piantadosi

Title	Net Sales	Net Returns	Royalty Rate	Total Royalties
Curse of an Aching Heart.....	43			
Curse of an Aching Heart—				
Orch.	5			
On the Shores of Italy.....	1			
	—			
	49		1½¢	.74
I've Lost All My Love for You..	3		½¢	.02
Pal of My Cradle Days.....	21		2¼¢	.47
People Like Us.....	2			
That's How I Need You.....	42			
	—			
	44		1¢	.44
I Didn't Raise My Boy to Be a Soldier	18		2¢	.36
	..			
			2.03	
			<u><u>2.03</u></u>	

Mechanical Royalties as per Statement Attached.....	4.12
Synchronization " " " " "	158.33
Foreign " " " " " .....	.18
Electrical Trans." " " " " .....	.02
	—
	164.68
Balance Our Favor as per Statement Previously Ren- dered	1,395.07—
	—
	Balance Our Favor....1,230.39—
South American Performing Fees as per Statement At- tached .....	.13
	—
	Balance Our Favor....1,230.26—
[Stamped] : H. J. & M. H. Behrman Co. New York City.	

[58]

Leo Feist Inc.

1629 Broadway : New York

ROYALTY STATEMENT FROM MECHANICAL
AND OTHER INCOME

To December 31, 1941

Al Piantadosi

Records	8 1/3% Curse of Aching Heart	23 1/3% Pal of Days	8 1/3% That's How I Need	Total
American				
Brunswick .....	.87			
Columbia	1.97			
Compo	2.57			
Decca	30.10			1.87
Sparton				
United States				
Victor	12.06			
Victor—Canada				
Rolls				
Aeolian				

Rolls	8 1/3% Curse of Aching Heart	23 1/3% Pal of Days	8 1/3% That's How I Need	Total
Imperial	—	—	—	
Wurlitzer	—	—	—	
Mech.				
Amount Rec'd.	47.57		1.87	
Your Share	3.96		.16	4.12
Synchro.				
Amount Rec'd.	400.00		1500.00	
Your Share	33.33		125.00	158.33
Foreign				
Amount Rec'd. ....	.76	.50		
Your Share .....	.06	.12		.18
Elect. Trans.				
Amount Rec'd. ....			.23	
Your Share .....			.02	.02
				[59]

EXHIBIT D

February 26, 1942

Leo Feist, Inc.,
 1629 Broadway,
 New York City,

Gentlemen:

I am representing Mr. Al Piantadosi in his matters with your firm. He is in receipt of your audited statement of royalties for the period ending December 31, 1941. On that statement you have an item showing the receipt by you of the sum of \$1500 covering Synchro. of song "That's How I Need You." Would you be good enough to inform him or myself of the details of this item.

Thanking you in advance for your favor, I am
Very truly yours,
(Signed) J. M. DANZIGER.

JMD/D

LEO FEIST, INC.
Music Publishers
1629 Broadway, New York, N. Y.
Circle 6-2939. Cable—Feistel

March 10, 1942

Mr. J. M. Danziger
408 South Spring Street
Los Angeles, California

Dear Sir:

We are in receipt of your communication of February 26th on behalf of your client Al Piantadosi. We beg to advise you that the item of \$1500. to which you refer was for the synchronization of the musical composition entitled "That's How I Need You" in the motion picture production of Metro-Goldwyn-Mayer entitled "Barnacle Bill".

Yours very truly,

LEO FEIST, INC.

(Signed) ABE OLMAN.

cb

[60]

March 16, 1942

Leo Feist, Inc.,
1629 Broadway
New York, N. Y.
Attention: Mr. Abe Olman

Dear Mr. Olman:

Thank you for your letter of March 10th in reply to mine of February 26th with relation to accounting to Al Piantadosi. Would you be good enough to advise me the date when the \$1500 item to which you refer was received?

Thanking you in advance for your favor, I am
Very truly yours,

(Signed) J. M. DANZIGER.

JMD:S

LEO FEIST, INC.
Music Publishers
1629 Broadway, New York, N. Y.
Circle 6-2939. Cable—Feistel.

March 20, 1942

J. M. Danziger, Esq.,
408 South Spring Street,
Los Angeles, California.

Dear Sir:

In response to your communication of March 16th, this is to advise you that the moneys disbursed by us for said synchronization use were received by us on July 29, 1941.

Very truly yours,
LEO FEIST, INC.

By (Signed) ABE OLMAN.

AO:cb

March 25, 1942

Leo Feist, Inc.,
1629 Broadway
New York, N. Y.
Attention: Mr. Abe Olman

Gentlemen:

Thank you for your letter of March 20, 1942 in response to mine of March 16, [61] 1942, concerning the account with Mr. Al Piantadosi.

Please take note that Mr. Piantadosi does in no way ratify or confirm your activities with relation to the various copyrighted musical compositions on which he claims to own copyrights and of which you assert to be the owner.

Very truly yours,

(Signed) J. M. DANZIGER,
In behalf of Al Piantadosi.

JMD:S

[Endorsed]: Filed Jul. 2, 1942. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF KATHERINE KINSCH IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

State of New York,
County of New York—ss.

Katherine Kinsch, being duly sworn, deposes and says:

I am over the age of 21 years and in full possession of all my faculties. I have personal knowledge of all the facts herein stated.

I am, and since in or about the year 1932 I have been, the manager of the Copyright Department of the defendant Leo Feist, Inc., a corporation.

That on or about November 25, 1939, Joe McCarthy, a co-writer of the musical composition entitled That's How I Need You, executed and delivered to me for and on behalf of said Leo Feist, Inc. a written assignment of all his rights whatsoever in and to said musical composition under the re- [63] newal and extension of the copyright obtained by him therein as one of the co-authors thereof and for and during the period of said renewal and extension of copyright therein. A true, correct and complete photostat copy of said assignment is attached hereto, marked Exhibit A, and by this reference incorporated herein as though fully set forth. I am familiar with the signature of said Joe McCarthy appearing on the original assignment, which signature is in fact the signature of

said Joe McCarthy. That said assignment was executed by said Joe McCarthy in my presence and in the presence of Dorothy McCarthy, the wife of said Joe McCarthy, in apartment 7A, premises 135 West 58th Street, in the Borough of Manhattan, City, County and State of New York, which I was then informed by said Joe McCarthy was his then place of residence. That said assignment was executed by said Joe McCarthy subsequent to May 22, 1939, the date that the said Joe McCarthy obtained said renewal and extension of the copyright in said musical composition.

KATHERINE KINSCH.

Subscribed and sworn to before me this 22nd day of June, 1942.

[Seal] EDWIN A. STARN,
Notary Public in and for the County of New York,
State of New York. Notary Public, New York
County. N. Y. Co. Clk's No. 337, Reg. No. 3-S-
288. Term Expires March 30, 1943.

* * * * *

[Endorsed]: Filed Jun. 27, 1942. [64]

[Title of District Court and Cause.]

AFFIDAVIT OF JOE McCARTHY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of New York,
County of Warren—ss.

Joe McCarthy, being duly sworn, deposes and says:

I am over the age of 21 years and in full possession of all my faculties. I have personal knowledge of all the facts herein stated.

I am a co-writer of the musical composition entitled That's How I Need You.

On May 22, 1939, within one year prior to the expiration of the original term of the copyright in said musical composition, I obtained a renewal and extension of the copyright therein as one of the co-writers thereof.

That on or about November 25, 1939, I executed and delivered to Katherine Kinsch, manager of the Copyright [65] Department of the defendant Leo Feist, Inc., for and on its behalf, a written assignment of all my rights whatsoever in and to said musical composition under said renewal and extension of the copyright obtained by me therein as one of the co-writers thereof and for and during the period of said renewal and extension of said copyright therein. A true, correct and complete photostat copy of said assignment is attached hereto, marked Exhibit A, and by this reference incorpo-

rated herein as though fully set forth. That my signature appears on the original assignment. That said assignment was executed by me in the presence of said Katherine Kinsch and in the presence of Dorothy McCarthy, my wife, in apartment 7A, premises 135 West 58th Street, in the Borough of Manhattan, City, County and State of New York, which was then occupied by my wife and myself as our place of residence. That said assignment was executed by me subsequent to May 22, 1939, the date that I obtained said renewal and extension of copyright in said musical composition.

JOSEPH McCARTHY.

Subscribed and sworn to before me this 23rd day of June, 1942.

[Seal] HAMILTON H. TRAVER,
Notary Public, Warren Co. N. Y. Certificate filed
in Saratoga Co. Commission expires, March 30,
1944.

* * * * *

[Endorsed]: Filed Jun. 27, 1942. [66]

[Title of District Court and Cause.]

AFFIDAVIT OF DOROTHY McCARTHY IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

State of New York,
County of Warren—ss.

Dorothy McCarthy, being duly sworn, deposes and says:

I am over the age of 21 years and in full possession of all my faculties. I have personal knowledge of all the facts herein stated.

I am, and for some time prior to November 25, 1939 I was, the wife of Joe McCarthy, one of the co-writers of the musical composition entitled That's How I Need You.

That on or about November 25, 1939, said Joe McCarthy executed and delivered to Katherine Kinsch, the manager of the Copyright Department of Leo Feist, Inc., for and on its behalf, a written assignment of all his rights [67] whatsoever in and to said musical composition under the renewal and extension of the copyright obtained by him therein as one of the co-authors thereof and for and during the period of said renewal and extension of copyright therein. A true, correct and complete photostat copy of said assignment is attached hereto, marked Exhibit A, and by this reference incorporated herein as though fully set forth. I am familiar with the signature of said Joe McCarthy appearing on the original assignment, which signa-

ture is in fact the signature of said Joe McCarthy. That said assignment was executed by said Joe McCarthy in my presence and in the presence of said Katherine Kinsch, in apartment 7A, premises 135 West 58th Street, in the Borough of Manhattan, City, County and State of New York, which was the then place of residence of said Joe McCarthy and myself. That said assignment was executed by said Joe McCarthy subsequent to May 22, 1939, the date that the said Joe McCarthy obtained said renewal and extension of the copyright in said musical composition.

DOROTHY McCARTHY.

Subscribed and sworn to before me this 23rd day of June, 1942.

[Seal] HAMILTON H. TRAVER,
Notary Public, Warren Co., N. Y. Certificate filed
in Saratoga Co. Commission expires, March 30,
1944.

* * * *

[Endorsed]: Filed Jun. 27, 1942. [68]

[Title of District Court and Cause.]

COUNTER-AFFIDAVIT OF
HERMAN F. SELVIN

State of California,
County of Los Angeles—ss.

Herman F. Selvin, being first duly sworn, deposes and says:

I am a member of the firm of Messrs. Loeb and Loeb, attorneys for defendants Loew's Incorporated and Metro-Goldwyn-Mayer Corporation herein.

In the first amended complaint on file herein plaintiff alleges that on or about June 1, 1939 he applied for a renewal of the subsisting copyright in the musical composition "That's How I Need You" and that the renewal copyright was issued to him on or about that date. He further alleges that ever since June 1, 1939 he has been the owner jointly with his co-authors of the renewal copyright in and to said musical composition. [69]

Attached hereto and marked Exhibit A is a certified copy of the application for renewal of said copyright filed by plaintiff on June 1, 1939. As appears from said renewal application the authors of said musical composition, on whose behalf said renewal was requested, were Joe McCarthy, Joe Goodwin and Al Piantadosi.

HERMAN F. SELVIN.

Subscribed and sworn to before me this 3d day of July, 1942.

[Seal] ELLOWENE EVANS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jul. 3, 1942. [70]

APPLICATION FOR THE WAL OF A
COPYRIGHT SUI NG IN ANY WORK

REGISTER OF COPYRIGHTS, Washington, D. C.

COPYRIGHT SUI **TING IN ANY WORK**

Application is hereby made within this the last

herewith described (in accordance with the provisions of section 23 of the Act of March 4, 1890), for the renewal of the copyright for 28 years from the date when the said copyright will expire. \$1 (statutory fee) is also enclosed.

- (1) The renewal copyright is claimed by me, us, as Author.
(Author, widow, widower, child—SEE OVER*)

Author—
(Author, widow, widower, child—SEE OVER)

- (2) Name of renewal owner Al Plantadoss (Give full legal name of renewal owner)

Al Piantadossi.

(Give full legal name of renewal owner)

- (3) Address 5116 Hazel Ave., Reseda, Cal.

Legal Ave., Reeds, Cal.

(State)

- (4) Title of work That's How I Need You

(Give address of each claimant)

That's How I Need You

- Page 05 of 10

- (8) Name of author of renewable matter Lyric - Joe McCarthy & Joe Woodman

Lyric - Joe McCarthy + Joe Goodwin
(Five days to live)

Application for renewal received
July - 1930

(6) Original registration: Class 6 No. 284725 Date of publication May 16, 1912

(7) If unpublished work, give date of original registration 19.....

(8) Name of original claimant See Feist, Inc., N.Y.

(9) Send certificate of registration to Gillian Lang - 70 S.P.A.

1958-6 Aug 3.4° 3.4

(10) Name and address of person or firm sending the fee *Silvia Land*

125 = 67% June 1964

(Street) (City) (State)
10-227A : 71 [Please turn this over]

Digitized by srujanika@gmail.com

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of music!

REGISTRATIONS FOR RENEWAL OF COPYRIGHTS CAN ONLY BE MADE DURING THE LAST YEAR OF THE EXISTING TERM

DIRECTIONS

*When the author is living and application is made by or for him, the words "the author" should be inserted in the blank at (1) left for that purpose after the words "copyright is claimed by me, us, as".

If the author is not living and application is made by

- (a) the widow or widower, then the words "the widow of the author" or "the widower of the author" should be inserted.
- (b) the child or children of the deceased author, then the words "the child of the deceased author" or "the children of the deceased author" should be inserted.
- (c) the executors of the will of the author, then the words "the executors of the author" should be inserted.
- (d) the next of kin of the author, then the words "the next of kin of the author, who is not living, there being no will", should be inserted.

USE A SEPARATE BLANK FOR EACH TITLE

Renewal registration may be made by the proprietor only under the following conditions, and in such cases the form of claim (to be given in space (1) of the renewal application) MUST be substantially in the form shown below:

1. If the work is posthumous or composite and if the copyright has been secured originally by the proprietor thereof, the present proprietor may renew as
 - (a) "Proprietor of the posthumous work";
 - (b) "Proprietor of the composite work."
2. If the work has been copyrighted by a corporate body otherwise than as assignee or licensee of the individual author, the proprietor may renew as
"Proprietor of a work copyrighted by a corporate body otherwise than as assignee or licensee of the author."
3. If the work had been copyrighted by the employer for whom such work was made for hire, the proprietor may renew as
"Proprietor of copyright in a work made for hire."

July 1967 - 20,000

16-6975 U. S. GOVERNMENT PRINTING OFFICE 1967

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA
WASHINGTON, D. C.

I hereby certify that the foregoing is a true copy of the application as same was received in this Office on the first day of June, 1937,
^{Received} for the registration of the musical composition Blue Eyes No. 214,725 (Renewal No. 75,377).
I declare that I have no need of you.

Entered in the name of Al Santodori,
5116 Highland Ave., Reseda, Calif. copyright claimant.
In witness whereof, the seal of this Office has been hereto affixed this ninth
day of June 1941.



Register of Copyrights

[Title of District Court and Cause.]

AFFIDAVIT OF J. M. DANZIGER IN RE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

J. M. Danziger, first being duly sworn, deposes and says:

That I am the attorney for the plaintiff in this action.

That I have in my possession carbon copy of a letter dated March 17, 1942 from Al Piantadosi to Joe McCarthy, copy of which is hereto attached and made a part hereof.

That I have in my possession the original of a letter from Joe McCarthy to Al Piantadosi, dated March 23, 1942, copy of which is hereto attached and made a part hereof.

That the attached are full, true and correct copies of the above letters.

That the letter from McCarthy to Piantadosi is the one which is partially quoted from in the affidavit of Al Piantadosi herein.

J. M. DANZIGER.

Subscribed and sworn to before me this 10th day of July, 1941.

[Seal] ANNE M. MOORE,

Notary Public in and for said
County and State. [73]

March 17, 1942

Mr. Joe McCarthy
c/o A.S.C.A.P.
30 Rockefeller Plaza
New York, N. Y.

My dear Joe:

As you know, I have brought a suit for infringement against Metro-Goldwyn-Mayer and Loew's for using our song "That's How I Need You" without right. This is a very important suit and if we win, it will amount to some real money.

Metro-Goldwyn-Mayer in their answer in this suit claim that both before the renewal of the copyright and after the renewal of the copyright, they made two separate contracts with you and Goodwin whereby they acquired outright all of your interest in this song and also, all of your interest in the renewal copyright. The renewal took place June 1, 1939. Will you please write me so that I can show it to my attorney and tell me whether you have ever made such contracts. I know that you made some kind of a contract under the old copyright some time prior to 1939. If you have a copy of the contract that you made at that time, it would be very helpful if you could send it to me. Or if you remember the terms of the contract, particularly whether it included motion picture rights, I would like to know this, but particularly and above all, did you make any kind of a contract after June 1, 1939, and if so, I would like to get a copy. If per-

chance you have any letters from Feist at any time on this subject and could spare them long enough for me to make copies, I would be glad also to have them.

Of course, you know that if I win this case, it means a lot to you, also.

Very truly yours,

(Signed) AL PIANTADOSI,
 5116 Zelzah Avenue, Tarzana,
 California. [74]

March 23, 1942.

135 West 58th St., N.Y.C.

Dear Al:

Yours just received and hasten to reply. I resigned my copyright with Feist about five years ago—That contract is in my vault at my summer place, Hadley, N. Y., over two hundred miles from here.

If you held and renewed your own contract, as I did on "You Made Me Love You", I believe you can collect a few thousand dollars if Metro used "Need You" without your consent. In my agreement with Robbins I had to give my consent for all available rights. I do not recall the exact price—It was about the same as all popular songs receive. My object was to keep all my copyrights alive and active—I think I received about seven thousand dollars advance for my entire catalogue—including all shows "Irene" "Rio-Rita" etc—I read where you were suing Metro for a goodly sum—if you never

were consulted—never sold out—never agreed to Metro using your melody—and I'll swear it is your melody—you should be paid what you think is fair.

I cannot receive anything that my signed contract does not call for.

If I can help you honestly I will be glad to do so—I always want to see the writer paid for his work—I repeat I believe you have a case independent of me—All the luck in the world to you and keep your good health—I've got a bad ticker and it's been acting up.

Please give my best to your family and to Arthur and his—

Yours as always,
(Signed) JOE McCARTHY.

[Endorsed]: Filed Jul. 10, 1942. [75]

At a stated term, to wit: The February Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 18th day of July in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable: Leon R. Yankwich, District Judge.

No. 2027-B-Civil

[Title of Cause.]

The motion of the defendant Loew's Incorpo-

rated, a corporation, filed June 16, 1942, for summary judgment in its favor, heretofore heard and submitted, is now decided as follows:

The said motion is hereby granted.

The Court is of the view that the pleadings on file, the affidavits filed in support of the motion, and those in opposition to it, clearly show that there is no genuine issue as to any material fact as to the defendant Loew's Incorporated, a corporation, and that this defendant is entitled to a judgment in its favor as a matter of law. Such judgment is ordered.

Formal Summary Judgment of Dismissal to follow. [76]

In the District Court of the United States
Southern District of California
Central Division

No. 2027-Y Civil

AL PIANTADOSI,

Plaintiff,

vs.

LOEW'S INCORPORATED, a corporation, et al.,
Defendants.

JUDGMENT OF DISMISSAL

This matter came on regularly to be heard on July 6, 1942, upon the motion of defendant Loew's

Incorporated for a summary judgment. Plaintiff appeared by J. M. Danziger, Esq., his attorney of record, and defendant Loew's Incorporated appeared by its attorneys, Messrs. Loeb and Loeb by Herman F. Selvin.

Said motion was duly argued and the court having concluded that the pleadings, depositions and admissions on file, together with the affidavits of the respective parties, show that no genuine issue as to any material fact exists and that said defendant is entitled to a judgment as a matter of law, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing of or from defendant Loew's Incorporated; [77] and that said defendant have and recover of and from plaintiff its costs incurred herein, which said costs are hereby taxed in the sum of \$20.00; and in addition thereto the sum of \$500.00 as attorneys' fees.

Dated: July 24th, 1942.

LEON R. YANKWICH

District Judge

Approved as to form as provided in Rule 8.

.....
Attorney for plaintiff

[Endorsed]: Filed Jul. 24, 1942. [78]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above Named Court:

Notice Is Hereby Given, That Al Piantadosi, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action in favor of defendant Loew's Incorporated, on July 24, 1942, in Civil Order Book No. 10 at page 439.

J. M. DANZIGER

Attorney for Appellant Al
Piantadosi

Suite 1400 Continental
Building
Los Angeles, California

Dated: October 20, 1942.

Copy mailed to Messrs. Loeb & Loeb, Attys. for deft. Loew's Inc. 10-21-42. Edmund L. Smith, Clerk by R. B. Clifton, Deputy.

[Endorsed]: Filed Oct. 21, 1942. [79]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 84, inclusive, contain

full, true and correct copies of First Amended Complaint Copyright Infringement; Answer of Defendants Loew's Incorporated and Metro-Goldwyn-Mayer Corporation to First Amended Complaint; Interrogatories to be Answered by Defendants Loew's Incorporated and Metro-Goldwyn-Mayer Corporation; Answers to Interrogatories Propounded by Plaintiff; except the pages following page 4 of Exhibits 5 and 6; Notice of Motion for Summary Judgment in Favor of Defendants; Affidavit of Abe Olman in Support of Motion for Summary Judgment; Affidavit of Al Piantadosi Against Motion for Summary Judgment; Affidavit of Katherine Kinsch in Support of Motion for Summary Judgment; Affidavit of Joe McCarthy in Support of Motion for Summary Judgment; Affidavit of Dorothy McCarthy in Support of Motion for Summary Judgment; Counter-Affidavit of Herman F. Selvin; Affidavit of J. M. Danziger in re. Motion of Defendants for Summary Judgment; Minute Order Entered July 18, 1942; Judgment of Dismissal; Notice of Appeal; Supersedeas-Cost Bond on Appeal and Stipulation re. Matters to be Included in Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$12.75 which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 23 day of November, A. D. 1942.

[Seal] EDMUND L. SMITH,

Clerk

By THEODORE HOCKE

Deputy Clerk.

[Endorsed]: No. 10314. United States Circuit Court of Appeals for the Ninth Circuit. Al Piantadosi, Appellant, vs. Loew's Incorporated, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 24, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals,
Ninth Circuit

No. 10314

AL PIANTADOSI,

Appellant,

vs.

LOEW'S, INCORPORATED,

Respondent.

STATEMENT OF POINTS ON WHICH APPELLANT RELIES AND RECORD TO BE PRINTED

STATEMENT OF POINTS ON WHICH APPELLANT WILL RELY

Comes now the Appellant in the above-entitled case, and files the following statement of points on which he intends to rely on this appeal.

(1) The Court erred in granting Summary Judgment for defendant Loew's, Incorporated upon the pleadings and file in this action.

(2) The Court erred in allowing the sum of Five Hundred Dollars as fee for attorneys representing Loew's, Incorporated, in this case.

**APPELLANT'S STATEMENT OF RECORD
TO BE PRINTED**

Appellant further states that only the following parts of the record as filed in this Court, are

deemed necessary to be printed for the consideration of the points set forth above, viz.:

All of the record shown in the Stipulation Re Matters To Be Included On Appeal, on file herein, except the Stipulation itself and Captions and formal parts of the documents set forth in said record.

Dated: November 25, 1942.

J. M. DANZIGER,

Attorney for Appellant.

Received copy of the within Statement of Points, etc., this 27 day of November, 1942.

LOEB AND LOEB

By (Illegible)

Attorneys for Respondent

[Endorsed]: Filed Nov. 30, 1942.

4

No. 10314.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL PIANTADOSI,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

J. M. DANZIGER,

408 South Spring Street, Los Angeles,

Attorney for Appellant.

FILED

JAN 14 1943

PAUL H. O'LEARY,

Parker & Baird Company, Law Printers, Los Angeles

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No. 10314.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL PIANTADOSI,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

Jurisdiction.

The Statute believed to sustain Appellate jurisdiction is Section 38 of Title 17 of the United States Code which provides that the judgment of the District Court under the Copyright Laws may be reviewed on appeal by this Court.

II.

Statement of the Case.

This suit is one for infringement of a copyright on a musical composition. The original defendants are Loew's Incorporated, a corporation; Metro-Goldwyn-Mayer Corporation, a corporation, and Leo Feist, Inc., a corporation. The Motion for Summary Judgment by two defendants, Loew's Incorporated and Metro-Goldwyn-Mayer Corporation was granted, by stipulation, as to Metro-Goldwyn-Mayer Corporation, and the full record of that dismissal is not before this Court. The defendant Leo Feist, Inc. has answered in the lower Court and this action pends there as to Leo Feist, Inc. The full record as to that defendant is not before this Court. The Motion for Summary Judgment was granted by the lower Court as to defendant Loew's Incorporated and that judgment is the subject of this appeal. No opinion was rendered in the lower Court.

The complaint charges defendant Loew's Incorporated, the respondent, with using a musical composition entitled "THAT'S How I NEED You" belonging to plaintiff, in a motion picture without right. Loew's Incorporated (respondent) in its answer admits the use and alleges a proper license from defendant Leo Feist, Inc., and claims there was no infringement, and various affidavits are before this Court on which the lower Court entered Summary Judgment for the defendant Loew's Incorporated.

III.

Specification of Errors.

- (1) The District Court erred in granting the motion for Summary Judgment.

IV.
ARGUMENT.

POINT A.

The Record Before the Court Shows That a Bona Fide Issue Has Been Raised That Requires a Trial on the Merits of the Case.

Appellant offered the following to substantiate his claim of infringement by respondent:

- (1) Allegations in his complaint [Tr. 2, 3, 4].
- (2) Admission by respondent of the use of the musical composition [Tr. 12].
- (3) Renewal registration of the renewal copyright by appellant [Tr. 3], which is admitted by respondent [Tr. 11].

A certificate of registration of a copyright claim is *prima facie* evidence of the facts therein stated.

Copyright Act 1909, Sec. 55—U. S. C. A. Title 17, par. 55;

Nutt v. National Institute, 31 F. (2d) 236;

Pisanno v. Knowles, 37 F. Supp. 118;

Freudenthal v. Hebrew Pub. Co. (N. Y.), 44 Fed Supp. 754;

Vitaphone Corp. v. Hutchison, 28 Fed. Supp. 526 at 529.

Defendant Loew's Incorporated also plead a registration of copyright by its licensor, Leo Feist, Inc. [Tr. 11]. An issue as to whether plaintiff, or defendant's licensor, was entitled to the copyright was raised thereby.

Summary Judgment ought not to be given unless the truth is clear. Upon the entire record the Court should be able to say that the trial of the action will be a useless form.

Whitaker v. Coleman, 115 F. (2d) 305.

(4) Allegations and denials in affidavit of Al Piantadosi as follows:

(a) Denial of terms of employment contract [Tr. 65] which contract is pleaded in answer [Tr. 13] on information and belief; and referred to in answer to Interrogatory 8 [Tr. 21] thus: "Loew's Incorporated has in its possession what purports to be a copy of the contract of employment between Leo Feist, Inc. and Al Piantadosi, a copy of which is attached hereto Exhibit 2."

It may be significant that Olman nowhere makes affidavit that there is such a contract.

(b) Denial of date of execution of assignments of renewal copyrights by Goodwin and McCarthy, and allegation that such assignments were made before renewal date; and letter of McCarthy [Tr. 87] that apparently contradicts his affidavit [Tr. 77] as to date of his renewal assignment. In this letter he states he "resigned my copyright with Feist about five years ago." His letter is dated Mar. 23, 1942. His affidavit says he resigned in 1939.

POINT B.

There Is No Conclusive Evidence in the Record of a License to Respondent Loew's Incorporated, or That the Alleged License Was Made Before the Infringement.

(a) There is evidence as follows, that the alleged license and check in payment of same were predicated and possibly fabricated to make out a license before infringement date, all sufficient to raise a *bona fide* issue as to whether any license had been made at all.

Exhibit "C" to Piantadosi affidavit [Tr. 71] shows an item of \$1500 received by Feist for "Synchro" on "THAT'S How I NEED You." Letter of March 10, 1942 [Tr. 72], part of Exhibit "D," indicates this sum was received for use in motion picture production "Bar-nacle Bill." Letter March 20, 1942 [Tr. 73] states the sum was received July 29, 1941. Piantadosi's affidavit [Tr. 68] states that defendant was notified of infringement on July 25, 1941. Defendant's answer in paragraph V [Tr. 12] admits that plaintiff notified them of his claim of infringement. No date was specified in complaint.

There is also a direct contradiction in respondent's statements as to the sum paid for this license, which is sufficient alone to raise a *bona fide* issue as to whether in fact there ever was a license. Olman in his letter of March 10, 1942 [Tr. 72] states that \$1500 was received for the license. The check [Tr. 24] states the sum to

be \$515.64, and the letter acknowledging receipt of the check [Tr. 64], recites the amount as \$515.64.

Another strange incident concerning the license check that requires a cross-examination of the parties to explain, is the fact that the check purportedly bearing date of July 21, 1941, was "certified" on July 31, 1941, and paid Aug. 5, 1941 [Tr. 24], the latter two dates being *after* notice of infringement on July 21, 1941.

(b) Piantadosi's affidavit [Tr. 68] alleges that infringement took place before May 1, 1941. The complaint alleges the infringement took place about June 1, 1941 [Tr. 4]. The earliest date that defendant claims to have any kind of license, and this allegation is not denied [Olman affidavit, Tr. 54], sets May 2, 1941, as date of first quotation for license.

(c) The record shows that Loew's Incorporated own controlling ownership of Leo Feist, Inc., through controlling ownership of another corporation, Robbins Music Corporation [Tr. 22]. Thus, Leo Feist, Inc., is a subsidiary of Loew's and any license from Fiest to Loew's would be one from a corporation to its parent. It is our contention that such a license should be put to all the tests of a fiduciary relationship. This is especially true where Feist purports to license its parent not only its own one-half interest in the musical composition but also the other one-half owned by appellant here. This feature will be referred to later in this brief.

POINT C.

Respondent Claims to Be the Owner of the Entire Copyright by Reasons of Allegations in Pleadings and Affidavits to the Effect That the Composition Was Made for Respondent by Appellant for Hire.

Respondent claims to have an employment contract with appellant in 1909 [Tr. 13, par. X] and pleads a copy [Tr. 21, Interrogatory 8]. Its execution is denied by appellant [Tr. 65]. Such denial raises an issue.

Assuming its execution, however, the contract does not show that respondent's licensor Feist, has the synchronization rights to the works of appellant. Certain definite publishing rights are granted and synchronization is not among them [Tr. 27 *et seq.*]. Synchronization was an unknown art in 1909 when the alleged employment contract was made, and could not inferentially be included. It is a synchronization right that is claimed to be licensed here.

POINT D.

Appellant Denies That Respondent's Licensor Feist Became a Co-owner in the Musical Composition.

Respondent claims it became a co-owner with appellant by purchase of co-authors' rights.

The musical composition here involved was written jointly by appellant Piantadosi and Messrs. Joe Goodwin and Joe McCarthy [Tr. 3, par. IV]. They thus became co-authors and are commonly held to be tenants in

common (*Maurel v. Smith*, 220 Fed. 195). During the first copyright period, during the year 1936, Feist acquired McCarthy's and Goodwin's rights in the composition by contract [Tr. 35 and 42]. These contracts attempted to convey the renewal rights to the copyright. The renewal copyright was obtained on June 1, 1939 [Tr. 3]. There is respectable legal authority for the proposition that a copyright owner may not sell his renewal right prior to its exercise. (*Silverman v. Sunrise Picture Corp.* (C. C. A. 2), 273 F. 909.)

A more recent case, *Witmark v. Fisher Music Co.* (C. C. A. 2), 125 F. (2d) 949, however, has sustained a sale of a copyright before renewal under the peculiar facts of that case, where a power of attorney had been given to the assignee and acted upon. This is not true in the instant case.

Respondent claims to have again acquired the co-authors' rights *after* renewal by contract [Tr. 57, Exhibit C; Tr. 39, Exhibit D]. Appellant questions the date of this after-renewal contract, the one dated September 18, 1939 [Tr. 66-67], although McCarthy's affidavit [Tr. 77] states he executed a second contract the date it bears, November 25, 1939. A genuine issue exists on this point.

These contracts show on their face that it was contemplated that Feist would also acquire the rights of appellant [Tr. 37, lines 4 to 6], which was not done. There is a question as to whether these contracts are not conditional.

POINT E.

Respondent Is Not the Owner of Any Valid Renewal Copyright.

Respondent says in Olman affidavit [Tr. 52], "On May 22, 1939 and within one year prior to the expiration of said original term of copyright in said musical composition entitled 'THAT'S WHY I NEED You' [meaning 'THAT'S How I NEED You'] said Leo Feist, Inc. obtained a renewal and extension of the copyright therein both in its name as proprietor (*by reason of the copyright having been originally secured by its predecessor in interest as an employer for whom said work had been made for hire*) and for, on behalf of and in the names of Joe McCarthy and Joe Goodwin as the authors of the words thereof, by making application therefor to the said Copyright Office, which application was thereupon duly registered therein on May 22, 1939, renewal registration No. 76764, as provided by section twenty-three of said Act."

To enable a proprietor to properly *renew* a copyright as an employer for whom the work had been made for hire, as here alleged by Feist, such renewal applicant must have obtained the *original copyright as a proprietor*.

In above affidavit Olman says that Feist obtained the renewal by reason of the copyright having been originally secured by its predecessor as an employer, etc.

However, Exhibit A to the Olman affidavit [Tr. 57], shows that the original copyright was not obtained by Feist *as an employer* but it shows that it was obtained'

for the authors. The renewal obtained by Feist, Inc. is not a valid renewal.

In the exhibit at page 83 of transcript will be found the Copyright Law requirements as to renewals by a proprietor. It states:

"3. If the work had been copyrighted by the employer for whom such work was made for hire, the proprietor may renew," etc.

See also:

Copyright Act, Title 17, Sec. 23, U. S. C. A.

Respondent makes the point in argument supported by affidavit [Tr. 81] that Piantadosi's copyright application enures to Feist as a co-owner. It may be noted in the Piantadosi application [Tr. 82] that he applied in behalf of his co-authors McCarthy and Goodwin, and not in behalf of Feist as a co-owner.

POINT F.

A Co-owner May Not Alienate or License His Co-owner's Rights in the Absence of an Agreement Permitting Him So to Do.

To render a Summary Judgment here the lower Court must have determined that one co-owner (Feist) may license his co-owner's (Piantadosi) rights as well as his own. Appellant denies any such right.

Co-owners, being tenants-in-common, are governed by the same rules. It is basic law that a co-owner cannot alienate any more than his own rights in the common property, and that, in the absence of an agreement permitting the same, he cannot encumber his co-owner's rights.

Freeman on Co-tenancy, par. 182, states the following:

“As a general rule, no co-tenant has, by virtue of the relation of co-tenancy, any authority to bind his companions in interest by any contract, whether relating to the joint contract or otherwise. Therefore, neither can, in the absence of special authority so to do, make a valid leasing of the moiety of his companion.”

Paragraph 183:

“Neither of the co-tenants has any authority, by virtue of the relation of co-tenancy, to transfer, or, by any means, to dispose of the common property.”

To the same effect, 62 *Corpus Juris*, 533-4 and cases there cited.

Respondent will contend that since either co-owner is entitled to the possession of the entire property, one co-owner may therefore license the entire possession. The authorities allegedly supporting this proposition are precarious and in our judgment do not support the contention. So far as we are able to find the question has never been settled by any Federal Court, and it is an important one in the industry and we are hopeful that this Court will settle the law on this point in this case.

Respondent will cite to this Court the following cases in support of his theory:

Klein v. Beach, 232 Fed. 240. The point in this case was whether the right to dramatize a play on the stage also gave the right to dramatize it in motion pictures. The Court therein, by way of dictum said: “Here both Beach and Klein became the owners of Klein’s drama,

and each could then do with it what he pleased, with the duty of accounting over."

But the Appellate Court in confirming this decision (239 Fed. 108) did not say anything in confirmation of this statement.

In this case, as appears in the facts stated in the lower Court decision, there was a written contract between the co-owners where one co-owner gave the other co-owner the sole and exclusive right to dramatize the jointly owned drama. Had Piantadosi here given Feist, as his co-owner, this right then of course Feist would have it. But here Feist says he may license without the consent of his co-owner.

Nillson v. Lawrence, 133 N. Y. S. 293. This case deals with a play and does hold that one tenant in common has a right to use it, or license third persons to use it.

Herbert v. Fields, 152 N. Y. S. 487, is a minor court decision. By way of dictum it says that one co-owner may license a play. It also points out a distinction between independent owners who did not collaborate in the creation of the work, as here, and joint owners of a product.

Carter v. Bailey, 64 Me. 458. The case of *Herbert v. Fields*, above, and respondent here, cite this case as authority. Weil on Copyright cites the same case. We feel that *Carter v. Bailey* is hardly any authority for the revolutionary proposition contended for. It is a decision by a County Appellate Court made in 1874, and in that case, for an accounting between partners, it was alleged that the partnership owned a book business, copyrights

and stereotype plates and by a written agreement between the partners it was agreed that the property should belong to them as tenants in common until converted into cash.

In the instant case, the musical composition which we alleged is infringed upon is used in a motion picture to such an extent that its further possible use in a feature motion picture is impossible. Its use in this instance has consumed the greater part of its value for such use. Such use is not comparable to using a play on the stage for a short period. A play so used can be used again and again—but a motion picture seldom, if ever, is again reproduced.

There is no case in the law books involving co-owner's rights in a musical composition used in a motion picture.

We quote below from English Chancery case of *Powell v. Head* (1879), L. R. 12 Ch. D. 686-688. In this case it was argued that the owner of a play could grant a license for its production without the consent of the other owners because, at common law, one tenant in common of a chattel has a right to use the chattel as he pleases. Jessel, M. R., rejects this argument saying:

“I am not at all inclined to extend the antiquated and barbarous doctrines which have been set aside partly by the Legislature and partly by Courts of Equity, to new rights created by Statute, and which are of a character wholly different from the rights of property to which these ancient doctrines apply.”

No total destruction can take place by license from one co-owner. *Osborn v. Schenck*, 83 N. Y. 200, and cases there cited.

The following cases are illustrative of appellant's position:

Highland Park v. Steel (C. C. A. 4), 235 Fed. 465 (certiorari denied 61 L. ed. 54);

Saulsberry v. Saulsberry (C. C. A. 6), 121 F. (2d) 318;

Southern Inv. Co. v. Postal Tel. Co., 156 N. C. 259; Ann. Cas. 1913 A 224, 72 S. E. 361.

We quote from the following:

Prairie v. Allen (C. C. A. 8), 2 F. (2d) 566, at p. 572:

The Court here approves the following quotation from 38 Cyc. p. 105:

“ ‘A tenant in common, not authorized thereto by his co-tenants, cannot execute a lease that will bind them without subsequent ratification even though the tenant in common attempting so to lease is in possession of the whole land; nor can he bind his co-tenants in the surrender of a lease without their authority; and any number of the cotenants less than the whole of them are incompetent to bind their nonrescinding tenants, by the rescission of a lease * * *.’ ”

Also the following from *Smith v. New Huntington General Hospital* (W. Va.), 99 S. E. 461:

“ ‘Cotenants have equal rights to the possession of land held in cotenancy, and one cotenant cannot lease the interest of another without his authority or consent. Freeman on Co-Tenancy, Par. 87.’ ”

Adams v. Yukon Gold (C. C. A. 9), 251 Fed. 226 at 229:

“But we have the general rule that one cotenant cannot bind his companions in a matter relating to the joint property, unless special authority is granted. He cannot make a promise on behalf of all cotenants or dispose of the property.”

We submit that the record herein shows clearly that there is a genuine issue between the parties that prevents any Summary Judgment; and that the lower Court erred in its conclusions that respondent is entitled to a judgment as a matter of law.

Respectfully submitted,

J. M. DANZIGER,

Attorney for Appellant.

No. 10314.

IN THE

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

AL PIANTADOSI,

Appellant,

25

LOEW'S INCORPORATED, a corporation,

Appellee.

APPELLEE'S REPLY BRIEF

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1. *Leucosia* *leucostoma* *leucostoma*
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DATA SOURCES

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No. 10314.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL PIANTADOSI,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation,

Appellee.

APPELLEE'S REPLY BRIEF.

Statement.

The answer of appellee Loew's Incorporated alleged [Tr. pp. 11 and 12] and, as will presently appear, the uncontradicted evidence supplied by affidavits and exhibits on the motion for summary judgment proved, that appellee's use of the song "THAT'S HOW I NEED YOU" in a motion picture was duly licensed by Leo Feist, Inc., the legal co-owner of the copyright. Any other issues claimed by appellant to have been present thereupon became immaterial since if appellee was duly licensed to use the song there could be no copyright infringement as alleged in the complaint and the trial of the suit would have been what appellant terms "a useless form."

ARGUMENT.

1. Appellee Used the Song Under a License From the Copyright Co-owner, Leo Feist, Inc.

The song "THAT'S How I NEED YOU" was used by appellee Loew's Incorporated in a motion picture produced by that company. The picture was first called "The Waterfront" and later entitled "Barnacle Bill." [Tr. p. 54.] This use was licensed by Leo Feist, Inc., as will appear from the correspondence between Leo Feist, Inc., and Loew's Incorporated as embraced in Exhibits E to I, inclusive. [Tr. pp. 60 to 64, incl.] Abe Olman, named in the correspondence, was secretary and general manager of Leo Feist, Inc. [Tr. p. 51]; Paul Vrablic, who signed one of the letters, was the accountant of Leo Feist, Inc. [Tr. p. 55], and Fred Raphael was an employee of Loew's Incorporated. [Tr. p. 55.] The authenticity of all of the signatures to the correspondence was proved by the affidavit of Abe Olman. [Tr. p. 55.]

There is no contradiction of the foregoing evidence in the record, nothing but the bare, unsupported denial by appellant in his affidavit in opposition to the motion for summary judgment. He says [Tr. p. 68]:

"That I deny that Leo Feist, Inc., have at any time licensed to defendant Loew's Incorporated the said musical composition That's How I Need You, or the right to use the same or any part thereof; or of any of my rights in the same or any part thereof."

Bare denials are insufficient to raise a genuine issue.

O'Meara Co. v. Nat. Park Bank, 239 N. Y. 386, 146 N. E. 636, 638;

Rosenthal v. Halsband, 51 R. I. 119, 152 Atl. 320, 321-2.

In the former case the New York Court of Appeals said:

“Defendant's affidavits used in opposition to the motion [for summary judgment] merely repeat the various denials contained in the answer. These denials were insufficient to raise an issue on a motion for summary judgment, since, under the rule, facts must be presented rather than mere general or specific denials in order to defeat a motion.”

Subdivision (e) of Rule 56 of Rules of Civil Procedure for the District Courts of the United States, under which the application for summary judgment herein was made, directs as follows:

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

In addition to the bare denial in his affidavit appellant advances under his Point B (Brief pp. 5 and 6) the claim that the license was “predated and *possibly* fabricated.” (Emphasis ours.) No facts are given to support this statement; the section of appellant's brief under “Point B” offers nothing but speculation, hearsay as to appellee and argument.

Since no facts were presented by appellant on his personal knowledge or such as would be admissible in evidence, appellee's evidence [Tr. pp. 60 to 64, incl.] remains unassailed and the license from Leo Feist, Inc., to appellee for the use of the song “THAT'S How I NEED You,” is proved.

We shall pass now to the evidence which shows without contradiction that at the time the license was given, Leo Feist, Inc., had become at least a co-owner of the copyright in "THAT'S How I NEED You" and was legally entitled to license appellee to use the copyrighted work without subjecting the latter to any liability to appellant who did not participate in the licensing.

2. After the Copyright Renewal Two of the Co-owners Assigned Their Rights to Leo Feist, Inc., and the Latter Became a Co-owner.

The renewal of the copyright in the song "THAT'S How I NEED You" occurred on May 22, 1939, as appears from Exhibit B attached to the affidavit of Abe Olman. [Tr. p. 57.]¹

Joe McCarthy and Joe Goodwin were co-authors and co-owners of the copyright in the song. [Tr. p. 57, Exhibits A and B; Tr. p. 82; App. Br. p. 7.] On November 25, 1939, McCarthy and Goodwin, each by a separate instrument, assigned all of their rights in the song to Leo Feist, Inc. [Tr. pp. 57 to 59, Incl., being Exhibits C and D.] Thereupon, Leo Feist, Inc., became either sole owner of the copyright or a co-owner with appellant if the latter had any interest in the copyright. In either event Leo Feist, Inc., was legally entitled to license the use of the copyrighted work. Authorities governing this matter will be listed presently.

Appellant claims that the McCarthy and Goodwin assignments were made before the renewal of the copyright.

¹It should be noted in passing, that in the body of Abe Olman's affidavit [Tr. pp. 51 to 55, incl.] the title of the song involved in this matter is erroneously given as "That's *Why* I Need You."

(App. Br. pp. 4 and 8.) No competent evidence was offered to support this claim and the only basis for it is a conjecture based on conversations and letters which are hearsay as to appellee. [Tr. pp. 67, 87 and 88.] Furthermore, appellant's attempt to show a conflict between McCarthy's hearsay letter [Tr. p. 87] and his affidavit [Tr. p. 77] fails to accomplish its purpose. The letter says: "I re-signed my copyright with Feist about five years ago." The letter is dated March 23, 1942. On September 18, 1936, McCarthy assigned his interest in the copyright to Leo Feist, Inc.² September, 1936, being about five and a half years before March, 1942, it is obvious that McCarthy was referring in his letter to the 1936 assignment and not to the 1939 assignment. There is therefore no conflict between this letter and the affidavit in which McCarthy says [Tr. p. 77] that on November 25, 1939, he executed and delivered to Leo Feist, Inc., an assignment of his rights.

It thus appears that by reason of the assignments dated November 25, 1939, made to Leo Feist, Inc., after the copyright renewal, the latter became a co-owner of the copyright in the song.

Copyright Act, Sec. 42;

Southern Music Pub. Co. v. Bibo-Lang, 10 F. Supp. 972, 974;

Marks Music Corp. v. Vogel Music Co., 42 F. Supp. 859, 867-8.

The rule is uniform in this country that one of several co-owners of a copyright may license a third party to use

²We shall refer again to this assignment later in this brief.

the copyrighted work, without subjecting such third party to any liability to the non-licensing co-owners.

Klein v. Beach, 232 Fed. 240, aff'd 239 Fed. 108;
Nillson v. Lawrence, 133 N. Y. S. 293, 294-5;
Herbert v. Fields, 152 N. Y. S. 487, 489-90;
Carter v. Bailey, 64 Me. 453;
Weil on Copyright, p. 547;
Amdur, Copyright Law and Practice, pp. 834, 5.

3. Even if the Assignments Were Made Prior to the Copyright Renewal the Assignee Was Nevertheless Entitled to the Renewal Rights if and When Obtained.

As has been shown the copyright was renewed on May 22, 1939; McCarthy and Goodwin made assignments to Leo Feist, Inc., on November 25, 1939, and appellant claims that these assignments were in fact made before the renewal date. Assuming that the truth of appellant's claim has been established (which, of course, we deny) the assignments were, nevertheless, perfectly valid and vested in Leo Feist, Inc., all of the interest of his assignors in the copyright and in the copyright renewal to be obtained thereafter. This principle has been announced in *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F. (2d) 949. The decision affirms the decision of District Judge Conger reported in 38 F. Supp. 72. Judge Conger's decision followed a very strong *dictum* by the Circuit Court of Appeals, Second Circuit, in the case of *Tobani et al. v. Carl Fischer, Inc.*, 98 F. (2d) 57. Concerning these cases the *Witmark* opinion by the Circuit Court of Appeals says:

“We are presented with a question of statutory construction which has apparently never arisen before,

though the general statutory provision has existed for over a hundred years. Simply stated, the problem is whether or not a copyright holder may assign his expectancy of the renewal right which arises under 17 U. S. C. A., sec. 23, at the expiration of the original twenty-eight year copyright grant. The district court upheld the validity of the assignment. 38 F. Supp. 72. This was in accordance with a strong *dictum* of this court in the case of *Tobani v. Carl Fischer, Inc.*, 2 Cir., 98 F. 2d 57, 60, certiorari denied 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420. We think it interpreted the law correctly."

Thus it appears that the assignments by McCarthy and Goodwin to Leo Feist, Inc., in November, 1939, *even if made before the copyright renewal*, as appellant claims, passed a perfectly valid title to the Feist company and fully justified the latter in licensing the use by appellee of the copyrighted work.

Assuming, but by no means conceding, that an issue of fact was raised as to the validity or actuality of the assignments made by McCarthy and Goodwin on November 25, 1939, appellee still has a complete defense to the suit and there is complete justification for the granting of a summary judgment. This is true because Joe McCarthy and Joe Goodwin had assigned to Leo Feist, Inc., all of their rights in the copyright and copyright renewal affecting the song "THAT'S How I NEED You" back in 1936 and concerning the validity of those assignments no issue of fact was or is raised.

On September 18, 1936, Joe McCarthy made a full and unqualified assignment of all of his rights in certain songs, including renewal rights, to Leo Feist, Inc. [Exhibit No. 5, Tr. pp. 34 to 40, incl.] The songs affected by

the assignment are enumerated in Schedule A. [Tr. pp. 40 to 42, incl.] In the preparation of the transcript appellant inadvertently omitted the song title "THAT'S How I NEED You." This title has been added as line 7 of page 42 of the transcript by an order for correction of the record recently made by this court.

It therefore appears that on September 18, 1936, Joe McCarthy assigned his rights in the song "THAT'S How I NEED You" to the Feist company. There is no contradiction of this evidence and no issue of fact raised regarding it.

On September 28, 1936, Joe Goodwin made a full assignment of all of his rights in the song "THAT'S How I NEED You," including copyright renewal rights, to the Feist company. [Tr. pp. 42 to 47, incl.] Goodwin assigned his rights at that time in a number of songs enumerated in Schedule A. [Tr. pp. 48 and 49.] The song "THAT'S How I NEED You" is listed as the fourth title on page 49 of the transcript.

There is no contradiction of the evidence supplied by this Goodwin assignment and no issue of fact raised as to its validity or actuality.

It follows therefore that even if it be held that the hearsay and otherwise incompetent statements in appellant's affidavit [Tr. pp. 65 to 69, incl.] raise a genuine issue as to the execution of the assignments dated November 25, 1939, there is no issue of fact as to the 1936 assignments. Under the *Witmark* case, *supra*, the latter assignments gave the assignors' copyright rights and renewal rights to Leo Feist, Inc., and entitled the latter to license or consent to the use of the song in question by appellee.

4. If Appellant Renewed the Copyright, Appellee Was Nevertheless Protected by the Subsequent License.

Appellant alleged in his complaint [Tr. p. 3] that he renewed the copyright on June 1, 1939. The renewal application appears on page 82 of the transcript. From this exhibit and from the affidavit of Herman F. Selvin [Tr. p. 81] it appears that the renewal was made on behalf of appellant's co-authors. It therefore inured to the benefit of his co-authors, McCarthy and Goodwin, so that their assignments to Leo Feist, Inc., and the latter's license or permission to appellee furnish a complete defense to this action.

Silverman v. Sunrise Picture Corp. (C. C. A. 2),
273 Fed. 909, 914;

Marks Music Corp. v. Vogel Music Co., 42 F. Supp. 859, 865, 868.

5. The Order Granting a Summary Judgment Was Proper.

Since appellee was duly and legally licensed or permitted by the owner or by a co-owner of the copyright to use the song "THAT'S How I NEED You," there can be no liability to appellant for such use. On a trial of the action judgment would have gone for appellee, the licensee, perforce. All issues except as to the validity and actuality of the license became and now are immaterial.

Conclusion.

It appears without substantial contradiction that Leo Feist, Inc., acquired the interests of appellant's co-owners in the renewal copyright either by valid antecedent assignments or by assignments executed after the renewal had been accomplished, and that Leo Feist, Inc., licensed or consented to the use of the song in question by appellee. Appellee therefore is fully protected since the prevailing rule in this country, as has been shown, is that one of several co-owners of a copyright may license a third party to use the copyrighted work without subjecting such third party to any liability to non-licensing co-owners.

Respectfully submitted,

MILTON H. SCHWARTZ,

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Attorneys for Appellee.

No. 10314

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AL PIANTADOSI,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation,

Appellee.

PETITION FOR REHEARING.

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PAUL P. O'BRIEN,
CLERK



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No. 10314

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL PIANTADOSI,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation,

Appellee.

PETITION FOR REHEARING.

Comes now Al Piantadosi, appellant in the above entitled cause, and presents this, his petition, for a rehearing of the above entitled cause and in support thereof respectfully shows:

I.

The court in its decision herein based the same largely on the legal principle that a copyright being similar to a patent should have applied the same rule so far as concerns the right of a co-owner to license a patent without the consent of his co-owner. This legal contention was not argued in any of the briefs and appellant desires to present argument on this point. There is a broad distinction between patents and copyrights set out in such cases as *Bobbs Merrill Company v. Straus*, 210 U. S. 339, 52 L. ed. 1086. One of the main distinctions is that the copyright statute provides only for the assignment of the right

as a whole, while the patent statute permits the patentee to subdivide his rights (*Bobbs Merrill v. Straus*, 147 Fed. 15, at 24).

II.

The court has overlooked the contention of appellant, but slightly argued in his brief (App. Br. p. 5), and not noticed in respondent's brief, that there is an issue here as to whether a license was made *before* the infringement took place. If the license was made after the infringement it would be no defense as it took place after the cause of action herein accrued.

An infringement took place on the making of the very first sound-record film footage that used the musical composition. The allegations of the Piantadosi affidavit states of his own knowledge that an infringement took place before May 1, 1941 [Tr. 68]; the affidavit of Piantadosi states as follows:

“That the infringement by defendants of the copyright of said musical composition ‘THAT’s How I NEED You’ took place before May 1, 1941, by the manufacture and public exhibition and sale of the use of the film ‘BARNACLE BILL,’ such manufacture, sale and public exhibition taking place during the months preceding May, 1941.”

The earliest date given by respondents' affidavits as to when the license was given by Feist to Loew's is fixed as May 1st, 1941, by the Olman affidavit [Tr. 54] and the first letter of Fred Raphael [Tr. 60] wherein Raphael confirms verbal quotations for the license as being given on May 1st and May 2nd.

The complaint charges that the first public showing of the film in theatres was about June 1, 1941 [Tr. 4]. To

make such showing it must have been a completed film and it is logical to assume that the making of the very first sound track using the infringed composition took place some considerable time before the film was completed, sold, and distributed to theatres.

The facts as to exactly the first date when the sound film was made and displayed to any part of the public are peculiarly within the knowledge of the respondent (defendant) and yet there is no denial in the record of the truth of Piantadosi's affidavit that the date of the first infringement was before May 1st, 1941, and a trial should be had to determine this issue.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the United States District Court be upon further consideration reversed.

Respectfully submitted,

J. M. DANZIGER,

Attorney for Appellant.

I, J. M. Danziger, attorney for above named Al Piantadosi, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay, and is well founded.

J. M. DANZIGER,

Attorney for Appellant.

Dated June 25, 1943.

No. 10326

**United States
Circuit Court of Appeals
For the Ninth Circuit.**

H. A. PIERCE,

**Appellant,
vs.**

ALBERT L. WAGNER,

Appellee.

Transcript of Record

**Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division**

FILED

JAN 9 - 1943

**PAUL P. O'BRIEN,
CLERK**



No. 10326

United States
Circuit Court of Appeals
for the Ninth Circuit.

H. A. PIERCE,

Appellant,

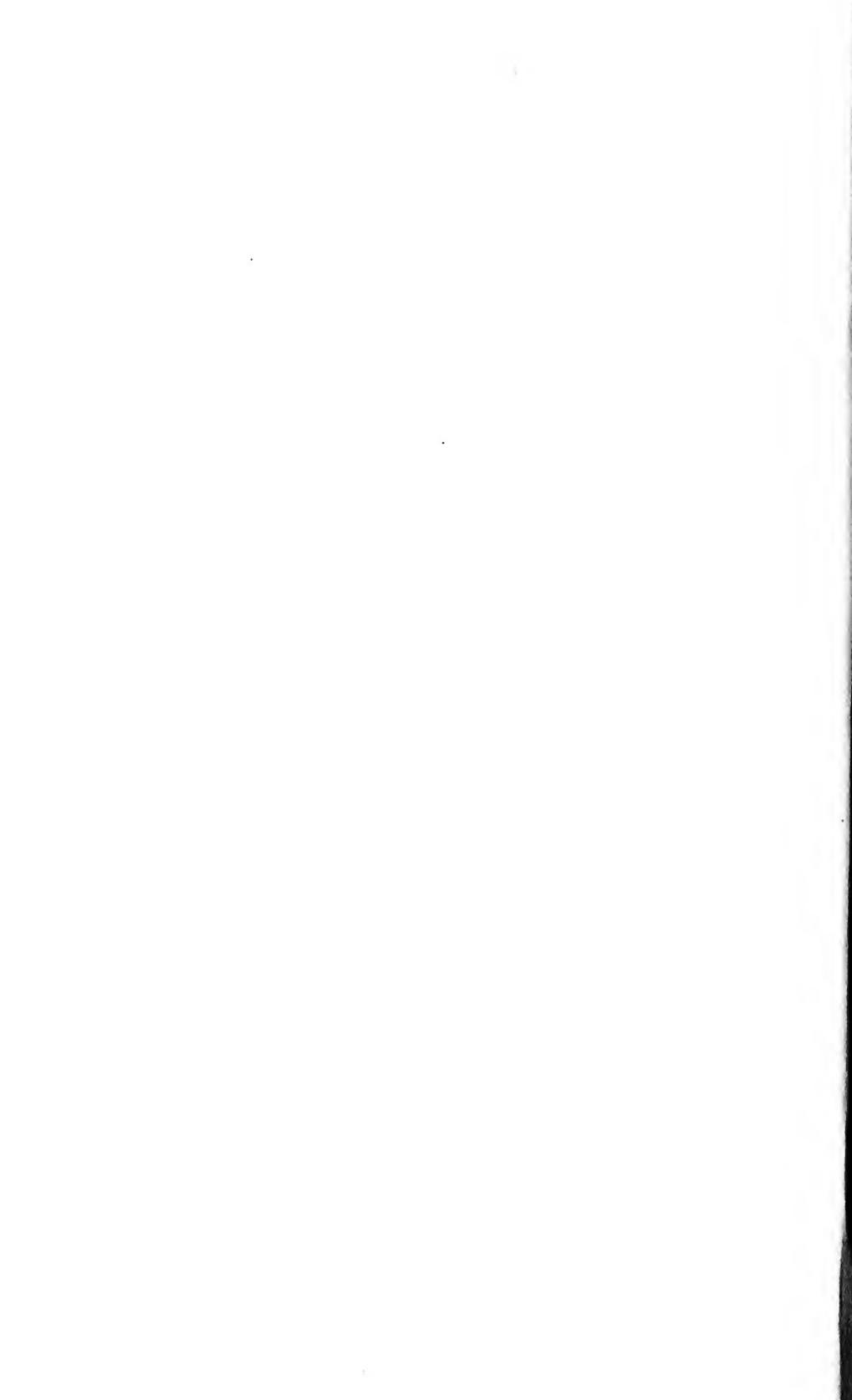
vs.

ALBERT L. WAGNER,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division



LAW OFFICER OF
LOEB AND LOEB
610 Pacific Mutual Bldg.,
523 West Sixth Street,
Los Angeles, California.

April 7, 1943

Honorable Paul P. O'Brien
Clerk, Circuit Court of Appeals
U.S. Post Office Building,
San Francisco, California

Re: Plaintiff v. Loew's Incorporated

Dear Mr. O'Brien:

According to the newspapers of April 5, 1943, the Witmark case, 125 Fed. (2) 949, cited on pages 6 and 7 of our answering brief, has been affirmed by the United States Supreme Court.

We should appreciate it very much if you would call this to the attention of the court in connection with the above appeal.

A copy of this letter has been sent to counsel for appellant.

Thanking you for your courtesy, I am

Very truly yours

s/ Milton N. Schwartz
of Loeb and Loeb

1. *Chlorophytum comosum* (L.) Willd.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee:

VAN DYKE & HARRIS,
Calif-Western States Life Bldg.,
Sacramento, Calif.

In the District Court of the United States
for the Northern District of California
Northern Division

No. 4311

H. A. PIERCE,

Plaintiff,

vs.

ALBERT L. WAGNER,

Defendant.

COMPLAINT

Comes now plaintiff and complains of defendant and alleges as follows:

I.

That plaintiff is a resident and citizen of the State of Oregon and defendant is a resident and citizen of the State of California.

II.

That the amount involved in this action and the sum in issue herein between plaintiff and defendant exceeds the sum of \$3000.00.

III.

That on or about December 22, 1928, Walter V. Pierce, a resident of Sacramento County, California, died testate in the State of California leaving an estate in said county and state.

IV.

That each of the following persons was an heir and devisee of said Walter V. Pierce and entitled to and decreed an undivided one-sixth interest in said estate and the assets thereof, to-wit:

H. A. Pierce

H. P. Pierce

C. C. Pierce

O. H. Pierce

V.

That the principal assets of said estate consisted of real property; that there were no encumbrances thereon but that said property was income property and that there were no debts owing [1*] by decedent at the time of his death and that the only obligations that were payable out of the assets of said estate before distribution to the creditors thereof were inheritance tax, funeral bill and expenses of administration.

VI.

That under and by virtue of the will left by said testator, L. B. Pierce was appointed executor of said estate and said L. B. Pierce so qualified and acted.

VII.

That in the early part of 1933, Reuben G. Lenske, an attorney at law in Portland, Oregon, was engaged to represent the aforesaid four heirs and

* Page numbering appearing at foot of page of original certified Transcript of Record.

devisees of said estate on a contingent basis for the purpose of hastening the distribution of said estate and obtaining the best possible distribution for each of said heirs and devisees and to look after their interest in said estate and the property therein until said heirs shall have realized their just portion of the said estate and the proceeds of the property thereof.

VIII.

That at said time no distribution had been made to said heirs and the expenses of administration and inheritance tax and funeral bill had not as yet been paid by said executor and said executor was using a portion of the property of the estate for his own benefit without payment of any rent to said estate.

IX.

That Reuben G. Lenske is and at all times herein mentioned has been an attorney at law **admitted to** and practicing in all courts in the State of Oregon and is a resident of the City of Portland and State of Oregon and that at all times herein mentioned defendant has been and now is an attorney at law practicing in the City of Sacramento and State of California and is a resident of the said City and State. [2]

X.

That in June, 1933 Reuben G. Lenske engaged defendant as associate counsel and said attorneys agreed as follows:

- (a) That defendant would become associated with Reuben G. Lenske in representing said heirs in all matters pertaining to said estate and the property therein until said estate shall have been fully administered and the property therein shall have been sold and the proceeds divided amongst the heirs entitled thereto.
- (b) That defendant would render all services that were necessary to properly represent said heirs in the matters hereinabove stated, except as herein otherwise provided.
- (c) Defendant agreed to keep Reuben G. Lenske fully informed of all developments in connection with said estate and said property and all matters of pertinence thereto and to advise Reuben G. Lenske of any important steps that might or should be taken and to consult with him by correspondence concerning the same.
- (d) That defendant agreed that within a reasonable time after he was so engaged as associate counsel, he would arrive at an understanding with two of said heirs and devisees, who lived in or near Sacramento, California, on a specific percentage basis that said attorneys were to operate on in their representation of said heirs.
- (e) Defendant agreed that he would promptly, efficiently and loyally handle all matters in connection with said estate, said property and the proceeds thereof as associate counsel of Reuben G. Lenske for said four heirs.
- (f) Defendant agreed that all fees of any and

all kinds which might be paid or payable to defendant, or defendant and Reuben G. Lenske as counsel for said four heirs, or in any direct connection with said estate or the property therein, should be divided equally until said estate shall have been closed, the property [3] sold and all of the proceeds thereof distributed to the heirs in accordance with their rights.

XI.

That defendant violated said agreement and was guilty of breaches thereof and was negligent in rendering said services in the following respects:

- (a) Defendant failed to keep Reuben G. Lenske fully and promptly informed of steps taken or steps that were about to be taken or were contemplated in the course of the administration of said estate.
- (b) Defendant failed to maintain the goodwill of the said two California heirs and devisees towards Reuben G. Lenske.
- (c) Defendant attempted to obtain the right of personal representation of said two heirs and attempted to exclude Reuben G. Lenske as one of the attorneys for said two heirs.
- (d) Defendant failed to arrive at an understanding with said two heirs for an exact percentage basis, which defendant and Reuben G. Lenske would receive out of the interest of said two heirs in said estate and property until after Reuben G. Lenske necessarily incurred considerable ex-

pense and expended time and energy towards accomplishing that which defendant had failed to do within a reasonable time.

(e) That defendant failed to prepare and present orders to the court in which proceedings concerning said estate were pending and after oral orders were made, until a long period expired after said oral orders were made.

(f) Defendant failed to render prompt information concerning important matters in said estate.

(g) Defendant failed to cooperate with Reuben G. Lenske in causing hearings to be set at suitable and advisable times.

(h) Defendant collected fees to which Reuben G. Lenske and defendant were entitled to participate in equal parts but defendant [4] failed to remit one-half thereof to Reuben G. Lenske.

(i) Without consultation with Reuben G. Lenske or plaintiff, defendant permitted and arranged for the appointment of one C. K. Curtright as referee in a partition suit concerning the real property in said estate instead of accepting the responsibility of said refereeship himself and thereby caused unnecessary and improper expenditures to the detriment to each of the heirs and devisees including Reuben G. Lenske as one of the assignees of a portion of said estate.

XII.

That as a result of said wrongful, negligent and improper conduct of defendant, said Reuben G. Lenske suffered pecuniary loss in that he had to

and did expend time and money in making numerous trips to Sacramento and in that he failed to receive his full portion of the fees in connection with the said estate and property, and in that the amount of money available for fees for him was less than that which he would otherwise have received, all to his damage and loss in the sum of \$1600.00.

XIII.

That prior to the commencement of this action, Reuben G. Lenske transferred and assigned all of his right, interest and cause herein to plaintiff *is* the holder thereof.

As a second cause of action herein plaintiff alleges as follows:

I.

Realleges all of the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of plaintiff's first cause of action herein the same as if the said paragraphs and allegations were fully set forth *haec verba*.

II.

That defendant became associated with Reuben G. Lenske as [5] counsel for plaintiff in representing plaintiff in all matters pertaining to the said estate and the property therein, including the sale of said property and the management thereof.

III.

That defendant received and had in his possession monies to which plaintiff was entitled and failed

to remit the same until demand was made upon him and until more than a reasonable length of time expired after he received the same.

IV.

That as a result of the negligent, improper and wrongful conduct of defendant as hereinabove set forth, including the paragraphs realleged from the first cause of action herein, plaintiff has been damaged in the sum of \$1600.00.

Wherefore plaintiff prays judgment against defendant for the sum of \$1600.00 on his first cause of action herein and the further sum of \$1600.00 on his second cause of action herein, making a total sum of \$3200.00 and for his costs and disbursements incurred herein.

/s/ REUBEN G. LENSKE
Attorney for Plaintiff [6]

State of Oregon,
County of Multnomah—ss.

I, H. A. Pierce being first duly sworn say that I am the plaintiff in the within entitled cause and the foregoing complaint is true as I verily believe.

/s/ H. A. PIERCE

Subscribed and sworn to before me this 10th day of April, 1941.

[Notarial] /s/ R. G. LENSKE
Seal] Notary Public for Oregon.
My Commission Expires 7/1/41.

I hereby certify that the foregoing is a full, true and correct copy of the original complaint herein.

.....

Attorney for Plaintiff.

[Endorsed]: Filed April 15, 1941.

[Title of District Court and Cause.]

MOTION FOR ORDER DISMISSING COMPLAINT, OR IN LIEU THEREOF FOR ORDER FOR MORE DEFINITE STATEMENT

Comes now defendant above named and moves the above entitled Court for an order as follows:

1. To dismiss said action on the ground that plaintiff's complaint on file herein fails to state a claim upon which relief can be granted, and upon the further ground that the Court does not have jurisdiction of the subject matter, the actual amount in controversy being less than \$3,000.00, in that the amount claimed to be due plaintiff by defendant was not set forth in said complaint in good faith, but that said amount was set forth for the sole purpose of making it appear that the above entitled Court has jurisdiction of the subject matter, all of which appears on the face of said complaint. [7]

2. In the event said motion to dismiss is denied, defendant moves said Court for an order requiring and directing plaintiff to serve and file herein a

more definite statement of facts in the following particulars:

- a. A statement showing the amount of damage suffered, as a result of the several alleged breaches of the agreement as set forth in each of subparagraphs "a" to and including "1" of paragraph XL of said first cause of action;
- b. A statement showing the amount of fees collected by defendant, one-half of which said Reuben G. Lenske was entitled to, as alleged in subparagraph "h" of paragraph XI of said first cause of action;
- c. A statement showing the specific amount of each of *each* element of damage alleged in said paragraph XI.
- d. A statement showing the manner in which the total amount of damage alleged in paragraph XII of said first cause of action was computed;
- e. A statement showing how and in what manner and in what amount said Reuben G. Lenske was damaged as a result of each and all of the alleged breaches set forth in subparagraphs a, b, c, d, e, f, g, and i of said paragraph XI of said first cause of action;
- f. A statement showing the causal connection between the alleged breaches of said agreement set forth in said paragraph XI of said first cause of action, and the general allegation of damage set forth in paragraph XII of said first cause of action;
- g. A statement showing: the number of trips made by said Reuben G. Lenske to Sacramento,

California, the amount expended by said Reuben G. Lenske on each of said trips, the amount of time consumed in making said trips to Sacramento, and the amount of pecuniary loss as a result thereof, the amount which said Reuben G. Lenske failed to receive as his share of said fees, and the amount said fees were diminished as a result of the [8] alleged "wrongful, negligent and improper conduct" of defendant,—as alleged in paragraph XII of said first cause of action;

h. A statement showing how and in what manner plaintiff suffered any damage as a result of the alleged breaches of said agreement between defendant and said Reubn G. Lenske, and showing the amount of damage suffered by plaintiff by reason thereof, and the causal connection between said alleged breaches and the damage alleged to have been suffered by plaintiff;

i. A statement showing: the amount of monies received and held by defendant as alleged in paragraph III of the second cause of action set forth in said complaint, and the length of time defendant unreasonably withheld the same, and the amount of damages claimed as a result thereof, and facts showing the basis upon which said damage is claimed and the method whereby the same is computed.

Said motion will be made upon the ground that said allegations of said complaint are not averred with sufficient definiteness and particularity to enable said defendant to properly prepare his responsive pleading herein or to prepare for trial.

In support of the above motions defendant will rely upon all of the pleadings and papers on file in this action, and upon oral and documentary evidence to be adduced at the hearing thereof.

Dated: July 1, 1941.

ANSON H. MORGAN

Attorney for Defendant

402 Farmers & Mechanics
Building, Sacramento,
California.

[Endorsed]: Filed July 1, 1941. [9]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of San Francisco, on Wednesday, the 6th day of May, in the year of our Lord one thousand nine hundred and 42.

Present: The Honorable Martin I. Welsh,
District Judge.

[Title of Cause.]

The motion to dismiss or in lieu thereof for order for more definite statement having been heretofore heard and submitted, being now fully considered, it is Ordered that the motion to dismiss be and the same is hereby denied. It is further Ordered that the motion for a more definite statement be and the same is hereby granted. [10]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now plaintiff and complains of defendant and alleges as follows:

I.

That plaintiff is a resident and citizen of the State of Oregon and defendant is a resident and citizen of the State of California.

II.

That the amount involved in this action and the sum in issue herein between plaintiff and defendant exceeds the sum of \$3000.00.

III.

That on or about December 22, 1928, Walter V. Pierce, a resident of Sacramento County, California, died testate in the State of California leaving an estate in said county and state.

IV.

That each of the following persons was an heir and devisee of said Walter V. Pierce and entitled to and decreed an *individed* one-sixth interest in said estate and the assets thereof, to-wit:

H. A. Pierce
H. P. Pierce
C. C. Pierce
O. H. Pierce

V.

That the principal assets of said estate consisted of real property; that there were no encumbrances thereon but that said property was income property and that there were no debts owing [11] by decedent at the time of his death and that the only obligations that were payable out of the assets of said estate before distribution to the creditors thereof were inheritance tax, funeral bill and expenses of administration.

VI.

That under and by virtue of the will left by said testator, L. B. Pierce was appointed executor of said estate and said L. B. Pierce so qualified and acted.

VII.

That in the early part of 1933, Reuben G. Lenske, an attorney at law in Portland, Oregon, was engaged to represent the aforesaid four heirs and devisees of said estate on a contingent basis for the purpose of hastening the distribution of said estate and obtaining the best possible distribution for each of said heirs and devisees and to look after their interest in said estate and the property therein until said heirs shall have realized their just portion of the said estate and the proceeds of the property thereof.

VIII.

That at said time no distribution had been made to said heirs and the expenses of administration and inheritance tax and funeral bill had not as yet

been paid by said executor and said executor was using a portion of the property of the estate for his own benefit without payment of any rent to said estate.

IX.

That Reuben G. Lenske is and at all times herein mentioned has been an attorney at law admitted to and practicing in all courts in the State of Oregon and is a resident of the City of Portland and State of Oregon and that at all times herein mentioned defendant has been and now is an attorney at law practicing in the City of Sacramento and State of California and is a resident of the said City and State. [12]

X.

That in June, 1933 Reuben G. Lenske engaged defendant as associate counsel and said attorneys agreed as follows:

(a) That defendant would become associated with Reuben G. Lenske in representing said heirs in all matters pertaining to said estate and the property therein until said estate shall have been fully administered and the property therein shall have been sold and the proceeds divided amongst the heirs entitled thereto.

(b) That defendant would render all services that were necessary to properly represent said heirs in the matters hereinabove stated, except as herein otherwise provided.

(c) Defendant agreed to keep Reuben G. Lenske fully informed of all developments in connection with said estate and said property and all

matters of pertinence thereto and to advise Reuben G. Lenske of any important steps that might or should be taken and to consult with him by correspondence concerning the same.

(d) That defendant agreed that within a reasonable time after he was so engaged as associate counsel, he would arrive at an understanding with two of said heirs and devisees, who lived in or near Sacramento, California, on a specific percentage basis that said attorneys were to operate on in their representation of said heirs.

(e) Defendant agreed that he would promptly, efficiently and loyally handle all matters in connection with said estate, said property and the proceeds thereof as associate counsel of Reuben G. Lenske for said four heirs.

(f) Defendant agreed that all fees of any and all kinds which might be paid or payable to defendant, or defendant and Reuben G. Lenske as counsel for said four heirs, or in any direct connection with said estate or the property therein, should be divided equally until said estate shall have been closed, the property sold and all of the proceeds thereof distributed to the heirs in accordance with their rights. [13]

XI.

That defendant violated said agreement and was guilty of breaches thereof and was negligent in rendering said services in the following respects:

(a) Defendant failed to keep Reuben G. Lenske fully and promptly informed of steps taken or

steps that were about to be taken or were contemplated in the course of the administration of said estate.

(b) Defendant failed to maintain the goodwill of the said two California heirs and devisees towards Reuben G. Lenske.

(c) Defendant attempted to obtain the right of personal representation of said two heirs and attempted to exclude Reuben G. Lenske as one of the attorneys for said two heirs.

(d) Defendant failed to arrive at an understanding with said two heirs for an exact percentage basis, which defendant and Reuben G. Lenske would receive out of the interest of said two heirs in said estate and property until after Reuben G. Lenske necessarily incurred considerable expense and expended time and energy towards accomplishing that which defendant had failed to do within a reasonable time.

(e) That defendant failed to prepare and present orders to the court in which proceedings concerning said estate were pending and after oral orders were made, until a long period expired after said oral orders were made.

(f) Defendant failed to render prompt information concerning important matters in said estate.

(g) Defendant failed to cooperate with Reuben G. Lenske in causing hearings to be set at suitable and advisable times.

(h) Defendant collected fees to which Reuben G. Lenske and defendant were entitled to participate

in equal parts but defendant [14] failed to remit one-half thereof to Reuben G. Lenske.

(i) Without consultation with Reuben G. Lenske or plaintiff, defendant permitted and arranged for the appointment of one C. K. Curtright as referee in a partition suit concerning the real property in said estate instead of accepting the responsibility of said refereeship himself and thereby caused unnecessary and improper expenditures to the detriment to each of the heirs and devisees including Reuben G. Lenske as one of the assignees of a portion of said estate.

XII.

That as a result of said wrongful, negligent and improper conduct of defendant, said Reuben G. Lenske suffered pecuniary loss in that he had to and did expend time and money in making numerous trips to Sacramento and in that he failed to receive his full portion of the fees in connection with the said estate and property, and in that the amount of money available for fees for him was less than that which he would otherwise have received, all to his damage and loss in the sum of \$2920.80 as is more specifically set forth herein.

XIII.

That by virtue of the premises as heretofore alleged, Reuben G. Lenske made the following trips from Portland, Oregon to Sacramento, California and spent a minimum of three days at each trip in travelling to and from and appearing in Sacra-

mento, California immediately prior to and after October . . , 1935, March 13, 1936, September 29, 1936 and December 7, 1936; that Reuben G. Lenske was damaged in the sum of \$189.30 by way of actual travelling expenses, fare, meals, hotels and miscellaneous expenditures in said trips.

XIV.

That Reuben G. Lenske was further damaged in the sum of \$900.00 as reasonable attorney fees for the time so expended. [15]

XV.

That by virtue of the premises Reuben G. Lenske was further damaged in that he expended monies for telegrams, copies of papers from clerks and similar expenditures in a sum exceeding \$10.00.

XVI.

That defendant collected the following fees, to which Reuben G. Lenske was entitled to one-half and which defendant failed and refused to remit any portion to him: November 3, 1939 \$210.00, July 3, 1940 \$350.00, October 21, 1940 \$145.00; that Reuben G. Lenske is entitled to one-half of said sums or \$352.50 together with interest thereon at the legal rate.

XVII.

That by virtue of the premises a referee's fee in the sum of \$300.00 was unnecessarily incurred in the sale of the property administered in said estate, resulting in loss and damage to Reuben G. Lenske

in the sum of \$26.00, being his portion of the contingent loss by said expenditure.

XVIII.

That on November 21, 1938 defendant received \$616.62 in fees to which Reuben G. Lenske was entitled to one-half; that defendant failed and refused to advise Reuben G. Lenske of the same until said fact was otherwise ascertained and at no time did he share said fee with Reuben G. Lenske but the same was equalized in March, 1939 when Reuben G. Lenske received an equal sum; that defendant is liable for interest on one-half of \$616.62 at the legal rate from November 21, 1938 until March 1939.

XIX.

That by virtue of the premises fees were allowed for the Executor of said estate and his attorney, which should not have been allowed if defendant had acted diligently and pursuant to said agreement; that said fees totalled approximately \$3032.44 and Reuben G. Lenske was damaged in the sum of \$267.00, being his share of the con- [16] tingent fee receivable from the said estate and properties.

XX.

That by virtue of the premises \$1440.14 was paid out and distributed to or for the trustee of a missing heir, which would otherwise inure to the benefit of all of the other heirs and a portion thereof would have inured to fees to Reuben G. Lenske in the

sum of \$126.00 and he was therefore damaged in said sum of \$126.00.

XXI.

That by virtue of the premises Reuben G. Lenske was required to expend time and work in correspondence and in sending wires and performing other services in connection with the matters hereinabove set forth that should and would not have been necessary had defendant performed his agreement as above set forth; that \$100.00 is a reasonable sum for such time and services so expended.

XXII.

That by virtue of the premises and the failure of defendant to arrive at an agreement with the aforesaid heirs for the amount of fees and his failure to render the services as agreed, the net amount of fees of Reuben G. Lenske was less than it would and should have been by the sum of \$950.00 and he was damaged in said sum.

XXIII.

That by virtue of the premises Reuben G. Lenske was damaged in the total sum of \$2920.80 and that prior to the commencement of the within action, Reuben G. Lenske transferred and assigned said cause to plaintiff and plaintiff is the holder thereof.

As a second cause of action herein plaintiff alleges as follows:

I.

Realleges all of the allegations of Paragraphs I,

II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, and XXIII of plaintiff's first cause of action herein the same as if the said paragraphs and allegations were fully set forth herein. [17]

II.

That defendant became associated with Reuben G. Lenske as counsel for plaintiff in representing plaintiff in all matters pertaining to the said estate and the property therein, including the sale of said property and the management thereof.

III.

That as a result of the negligent, improper and wrongful conduct of defendant as hereinabove set forth, including the paragraphs realleged from the first cause of action herein, plaintiff has been damaged in the sum of \$970.40, which sum is more specifically set out as follows:

IV.

That by virtue of the premises \$972.15 was paid to the trustee of a missing heir in lieu of the five brothers of decedent in equal shares, one of whom is plaintiff.

V.

That by virtue of the premises the following sums were paid out of said estate that should and would have inured to the five persons hereinabove mentioned, including plaintiff, to-wit: Fees of Executor and his attorney \$3,032.44, Referee's fees

\$300.00, Interest on delinquent inheritance tax \$399.94.

VI.

That by virtue of the premises interest on rent owing by the Executor was not paid by him or charged against him, to loss in a sum in excess of \$800.00.

VII.

That by virtue of the premises \$467.99 was paid to said trustee for a missing heir in lieu of the five heirs of an estate in Iowa, of which five heirs plaintiff was one and of which sum plaintiff should have received one fifth.

VIII.

That by virtue of the premises various other disbursements [18] were made out of said estate that would and should have been disallowed if defendant had diligently carried out said agreement and that said items are \$95.00 additional executor's fees, \$32.50 bond premium, \$69.80 costs, \$150.00 to title company and \$8.80 for safe deposit box.

IX.

That plaintiff was entitled to one fifth of said sums less 22½% and was therefor damaged in the sum of \$970.40.

Wherefore plaintiff prays judgment against de-

fendant for the sum of \$3891.20 with interest and costs and disbursements.

REUBEN G. LENSKE
Attorney for Plaintiff
825 Yeon Bldg.
Portland, Ore.
Be. 3115.

[Endorsed]: Filed June 5, 1942. [19]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS ACTION,
AND MOTION FOR A MORE DEFINITE
STATEMENT

Comes now the defendant, Albert L. Wagner, and moves the Court as follows:

I.

To dismiss the action because the complaint fails to state a claim against the said defendant, upon which relief can be granted.

II.

To dismiss the action because the Court lacks jurisdiction of the cause, in that the amount in controversy is less than three thousand (\$3,000.00) dollars.

III.

For a more definite statement of the allegations of [20] plaintiff's complaint, in the following particulars.

(a) Said complaint is indefinite in that the acts of negligence alleged to have been committed by defendant are not specifically set forth, and in that there is no allegation as to any of said acts of negligence that the same caused damage to plaintiff or his assignor or that the various acts of the Court in which the Estate of Pierce was being probated would have been different had the defendant not been negligent, nor is it alleged in this connection how or why any negligence of the defendant proximately caused any damage to plaintiff or his assignor;

(b) The complaint is indefinite in that it does not appear therein why or how the alleged breaches of the alleged agreement between plaintiff's assignor and defendant could, would or did cause any damage to plaintiff's assignor or plaintiff, and in this connection defendant makes the following specifications;

1. It does not appear why defendant's alleged failure to keep plaintiff's assignor informed of steps taken in the course of the administration of the Estate of Pierce could or did cause him or plaintiff any damage;

2. How defendant's alleged attempt to obtain the right of personal representation of said two heirs could or did cause damage to plaintiff or his assignor;

3. How defendant's failure to maintain good-will toward plaintiff's assignor of the two California heirs could or did cause damage to plaintiff or his assignor;

4. How defendant's alleged failure to arrive at an understanding with said two heirs could or did cause damage to plaintiff or his assignor;
5. How defendant's alleged failure to prepare and present [21] orders to said probate court could or did cause damage to plaintiff or his assignor;
6. How defendant's alleged failure to render prompt information concerning said probate matters could or did cause damage to plaintiff or his assignor;
7. How defendant's alleged failure to become a Referee in the partition suit in said probate proceedings could or did cause damage to plaintiff or his assignor.

(c) Said complaint is indefinite in that nowhere in the same is defendant informed as to what he is claimed to have negligently done or omitted in and about any of the proceedings in said probate court, in which he is alleged to have represented the four heirs named in plaintiff's complaint, or in which he was associated as counsel for them with plaintiff's assignor; and particularly said complaint fails throughout to specify any particular proceeding in said probate court in respect of which defendant did or omitted any specific act which in the performance of his duty as an attorney he should have done or should have omitted; and said complaint throughout is likewise indefinite in that nowhere therein does it appear what action was taken by said probate court which was improper or why or how if any improper ac-

tion was taken by said probate court any act or omission of defendant was the proximate cause of such improper action.

Dated: June 20, 1942.

VAN DYKE & HARRIS

B. F. VAN DYKE

Attorneys for Defendant. [22]

To Reuben G. Lenske, Attorney for Plaintiff; and
to H. A. Pierce, Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before the above entitled Court at the courtroom thereof, United States Courts and Post Office Building, Sacramento, California, on Monday, July 13, 1942, at ten o'clock A. M., of said day, or as soon thereafter as counsel can be heard.

Dated: June 20, 1942.

B. F. VAN DYKE

VAN DYKE & HARRIS [23]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 21st day of September, in the year of our Lord one thousand nine hundred and 42.

Present: The Honorable Martin I. Welsh,
District Judge.

H. A. PIERCE,

Plaintiff,

vs.

ALBERT L. WAGNER,

Defendant.

The motion to dismiss and for a more definite statement came on regularly this day to be heard. B. F. Van Dyke, Esq., was present for and on behalf of the defendant. There was no appearance on behalf of the plaintiff. After hearing Mr. Van Dyke, it is Ordered that the motion to dismiss be and the same is hereby granted, and that this case be and the same is hereby dismissed. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that H. A. Pierce, plaintiff in the above entitled action, does hereby appeal to the United States *Circuit of Appeals* for the Ninth Circuit from that certain judgment or order entered in the above entitled cause on or about September 21, 1942, by the District Court of the United States for the Northern District of California, Northern Division, wherein and whereby said action of plaintiff was dismissed; and H. A. Pierce, appellant, does hereby deposit with the Clerk of the above entitled Court the sum of \$250.00

in lieu of and to function as a cost bond on appeal, to secure the costs on appeal in the event the appeal is dismissed or the judgment is affirmed.

REUBEN G. LENSKE

Attorney for Plaintiff-
Appellant

825 Yeon Bldg.,
Portland, Ore.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal]

WALTER B. MALING,
Clerk, District Court of the
U. S., Northern District of
California.

By F. M. LAMPERT
Deputy Clerk.

[Endorsed] : Filed Oct. 20, 1942. [34A]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Comes now the Plaintiff above named, appellant, and designates the following portions of the record, for the appeal herein.

1. Complaint
2. Defendant's Motion to Complaint
3. Amended Complaint
4. Defendant's Motion to Amended Complaint
5. Judgment or Order of Dismissal
6. Order of May 6th, 1942.

REUBEN G. LENSKE
Attorney for Plaintiff

State of Oregon

County of Multnomah—ss.

I hereby certify that on September 21, 1942 I mailed a true copy of the above Designation to Van Dyke & Harris, attorneys at law, 913 California-Western States Life Bldg., Sacramento, in an envelope deposited in the Post Office at Portland, Oregon with the postage prepaid thereon.

REUBEN G. LENSKE
Attorney for Plaintiff

[Endorsed]: Filed Nov. 23, 1942. [35]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of H. A. Pierce vs. Albert L. Wagner, No. 4311, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation of Contents of Record on Appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of Five and 30/100 (\$5.30) Dollars, and that the same has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 4th day of December, A. D. 1942.

[Seal]

WALTER B. MALING,
Clerk

By F. M. LAMPERT

Deputy Clerk. [36]

[Endorsed]: No. 10326. United States Circuit Court of Appeals for the Ninth Circuit. H. A. Pierce, Appellant, vs. Albert L. Wagner, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed December 7, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10326

H. A. PIERCE,

Plaintiff-Appellant,
vs.

ALBERT L. WAGNER,

Defendant-Appellee.

**DESIGNATION OF POINTS AND
RECORD FOR PRINTING**

Comes now appellant and designates the following points on which he intends to rely on the within appeal.

1. The amended complaint states two good causes against defendant for sums totalling in excess of \$3000.00.

2. The amended complaint shows on its face that appellant has good causes against appellee and that the Court has jurisdiction of the causes.

3. The amended complaint states the ultimate facts as required by Federal Rules of Civil Procedure, excepting that the pleading may be too prolix but this was required by the District Court in an order ruling on the original complaint.

Appellant designates for printing the complaint, the defendant's motion to the complaint, consisting of three pages, the amended complaint, the notice of motion to dismiss action consisting of three pages, and the judgment or order of dismissal, the formal portions to be omitted.

REUBEN G. LENSKE

Attorney for Appellant

825 Yeon Bldg.

Portland, Oregon

CERTIFICATE OF SERVICE

State of Oregon
County of Multnomah—ss.

I, Reuben G. Lenske, hereby certify that I served the attached Designation upon appellee by mailing a duly certified copy thereof on December 27, 1942 in the Post Office at Portland in an envelope with the postage prepaid for airmail and so designated, addressed to Van Dyke & Harris, Attorneys at law, 913 California-Western States Life Bldg., Sacramento, California.

REUBEN G. LENSKE

Subscribed and sworn to before me this 27 day of December, 1942.

[Seal] ASHBY C. DICKSON
 Notary Public for Oregon

My commission expires 9/25/43.

[Endorsed]: Filed Dec. 29, 1942.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

H. A. PIERCE,
Appellant,

vs.

ALBERT L. WAGNER,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United
States for the Northern District of California,
Northern Division.

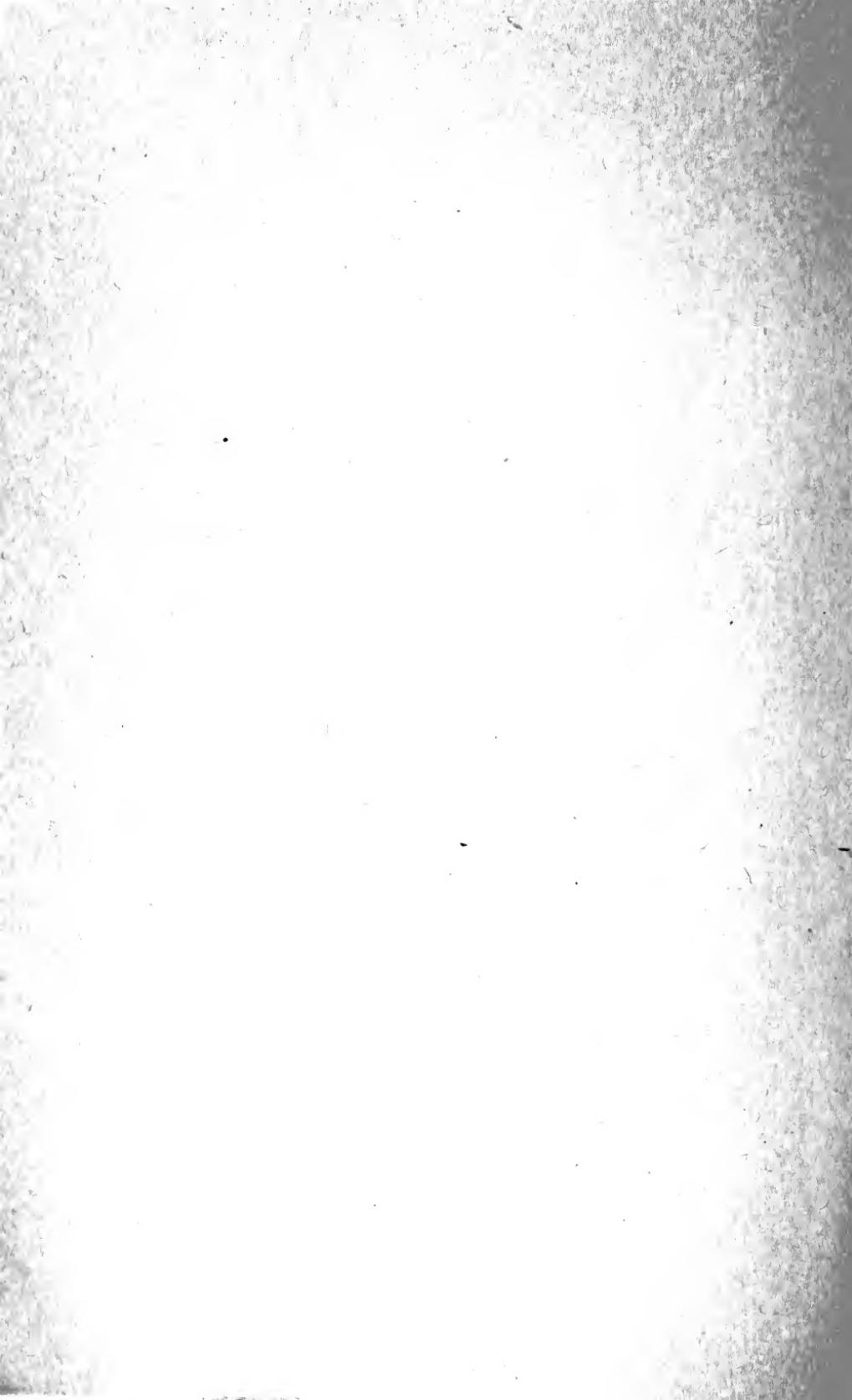
REUBEN G. LENSKE,
Yeon Bldg., Portland, Ore.,
Attorney for Appellant.

VAN DYKE & HARRIS,
Calif.-Western States Life Bldg.,
Sacramento, Calif.
Attorneys for Appellee.

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PAUL P. O'BRIEN,
CLERK



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In the United States
Circuit Court of Appeals
For the Ninth Circuit

H. A. PIERCE,
Appellant,

vs.

ALBERT L. WAGNER,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United
States for the Northern District of California,
Northern Division.

JURISDICTION

This is an action for damages resulting from breach
of duty by defendant, an attorney. There are two
causes of action totalling \$3891.20. See amended com-
plaint on page 14 of transcript. Plaintiff and his as-
signor are both residents of the City of Portland,
Oregon and defendant is a resident of Sacramento,
California. Defendant filed an alternative motion to

plaintiff's original complaint seeking dismissal of the action or a more definite statement of the two causes. The motion to dismsis was denied and the motion for a more definite statement was allowed. Thereupon the amended complaint was filed. To the amended complaint a motion to dismiss and motion for a more definite statement was filed. The motion to dismiss was thereupon allowed. This appeal is from the order dismissing plaintiff's case.

STATUTORY PROVISIONS

The District Court had jurisdiction of the cause because of the diversity of citizenship of the parties and the amount in controversy exceeded \$3000. See 28 U.S.C.A. Sec. 41, (1) and (c). The Circuit Court of Appeals has jurisdiction as appellate court. See 28 U.S.C.A. Sec. 225 (a) First.

SPECIFICATION OF ERRORS

1.

The District Court erred in dismissing the amended complaint and case.

AUTHORITIES

Rule 8 (a) (2) and rule 8 (e) (1) of the Rules of Civil Procedure.

STATEMENT OF THE CASE

Rule 8 (a) (2) of the Rules of Civil Procedure states:

“A pleading which sets forth a claim for relief . . . shall contain (2) a short and plain statement of the claim showing that the pleader is entitled to relief.”

Rule 8 (e) (1) says:

“Each averment of a pleading shall be simple, concise, and direct. . . .”

Pursuant to these rules Appellant filed his complaint appearing on page 2 of the transcript. Appellee filed a motion to dismiss the complaint or for a more definite statement. The District Court denied the motion to dismiss and allowed the motion for a more definite statement. Thereupon appellant filed an amended complaint comprising pages 14 to 25 of the transcript of record. Then appellee filed another motion to dismiss or for a more definite statement. The motion to dismiss was allowed by order of the District Court on September 21, 1942.

There is only one question in this case and that is whether the amended complaint complies with the jurisdictional requirements and sets forth a good claim pursuant to the rules of Civil Procedure. Paragraphs I and II of the amended complaint appearing on page 14 of the transcript of record set forth the diversity of citizenship and the general allegation that the amount in issue exceeds the sum of \$3,000. Thereupon the com-

plaint alleges the agreement upon which the transaction is based (See paragraph X, commencing on page 16 of the transcript). In Paragraph XI commencing on page 17 of the transcript the breaches and negligence of Appellee are set forth.

Thereupon in the remaining paragraphs appellant specifies the amount of damages by way of expenses, loss of time and loss of fees that were suffered on the first cause. These could not be pleaded in greater detail without pleading the detailed evidence and law.

The amount sought on the first cause of action totals \$2,920.80, besides interest and costs. In the second cause of action appellant seeks to recover \$970.40, making altogether \$3,891.20 plus interest and costs that are placed at issue by the complaint.

The specific items and damages claimed by appellant can and did flow from the wrongful and negligent conduct of appellee. The pleading and the allegations therein speak for themselves. They are clear and unequivocal. Unnecessary authorities or argument cannot enlighten the Court better than the plain words appearing upon the amended complaint and we submit the issue to the Appellate Court upon the plain words of the amended complaint

Respectfully,

REUBEN G. LENSKE,

Attorney for Appellant.

No. 10,326

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

H. A. PIERCE,

Appellant,

VS.

ALBERT L. WAGNER,

Appellee.

Upon Appeal from the District Court of the United States,
for the Northern District of California,
Northern Division.

BRIEF FOR APPELLEE.

VAN DYKE & HARRIS,

California State Life Building, Sacramento, California,

Attorneys for Appellee.

FILED

MAR 5 - 1943

**PAUL P. O'BRIEN,
CLERK**



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No. 10,326

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

H. A. PIERCE,

vs.

Appellant,

ALBERT L. WAGNER,

Appellee.

Upon Appeal from the District Court of the United States,
for the Northern District of California,
Northern Division.

BRIEF FOR APPELLEE.

ARGUMENT.

**THE COMPLAINT STATES NO CLAIM SHOWING THAT THE
PLEADER IS ENTITLED TO RELIEF.**

This action seeks to recover damages claimed to have resulted from negligence of an attorney in the performance of his duties as such.

The complaint is in two counts, the second count repleading in its entirety the first count and adding thereto certain additional matters.

It appears from the complaint that a certain estate of a decedent was being probated in the Superior Court of Sacramento County, California; that four

named persons were entitled to succeed, each to an undivided one-sixth interest in the estate; that these four engaged one Reuben G. Lenske, an attorney-at-law, to represent their interests, and that Lenske associated defendant, an attorney-at-law admitted to practice in California, in the matter of said representation; that defendant was negligent in the performance of his duties,—this allegation being general, without the specification of any act of negligence;—that damage resulted from this negligence, first, to Lenske, in the sum of \$2920.80, and, second, to plaintiff, in the sum of \$970.40.

As a complaint against an attorney for negligent performance of his duties as such, the complaint throughout is fatally defective, in that no negligence is pleaded. This is so because in complaints against attorneys for negligence it is not sufficient to allege negligence in general terms. *Feldesman v. McGovern*, 44 Cal. App. (2d) 566, at page 568.

In the cited case the Court holds that:

“In an action brought by a client against his attorney for the latter’s alleged negligence in failing to perform some act in behalf of the client, the complaint must not only specify the act, but must specifically allege and the plaintiff must prove that if the attorney had performed the act it would have resulted beneficially to the client.”

See also:

Maryland Casualty Co. v. Price, 231 Fed. 397.

THE DISTRICT COURT HAD NO JURISDICTION OF THE CAUSE
BECAUSE THE AMOUNT IN CONTROVERSY WAS LESS
THAN THREE THOUSAND DOLLARS.

For negligence in the performance of his duties an attorney-at-law is responsible to his client alone.

“It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone; that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties.”

3 *California Jurisprudence* 672.

See also:

Buckley v. Gray, 110 Cal. 339;

National Savings Bank v. Ward, 100 U. S. 195.

Defendant was not the attorney for Lenske. It clearly appears that Lenske, having undertaken the representation of these heirs, associated defendant with him, and that defendant performed services as an attorney-at-law for these heirs. This made defendant the attorney for the heirs, one of whom was plaintiff.

“An agent, if properly authorized, may, of course, employ an attorney on behalf of his principal, and such employment does not create the relation of attorney and client between the attorney and the agent.”

3 *California Jurisprudence* 609.

See also:

Porter v. Peckham, 44 Cal. 204.

For negligence in the performance of defendant's duties as an attorney, therefore, if such negligence had been properly pleaded, only the heirs, or one or more of them, may sue. Plaintiff, one of the heirs, sues in his own right, claiming that by the negligence of defendant he was damaged in the sum of \$970.40. He seeks to build up the amount in controversy by suing as assignee of Lenske for the recovery of \$2920.80, in which sum Lenske claims to have been damaged by reason of the negligence of defendant in the performance of his duties as an attorney-at-law for other people. Lenske has no such cause of action, and so plaintiff's complaint in respect to the matter of jurisdiction is left to rest alone upon his own cause of action, in which he seeks to recover a sum far below the jurisdictional requirements.

It is respectfully submitted that the order of dismissal should be affirmed.

Dated, Sacramento, California,
March 5, 1943.

Respectfully submitted,
VAN DYKE & HARRIS,
Attorneys for Appellee.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

H. A. PIERCE,
Appellant,

vs.

ALBERT L. WAGNER,
Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United
States for the Northern District of California,
Northern Division.

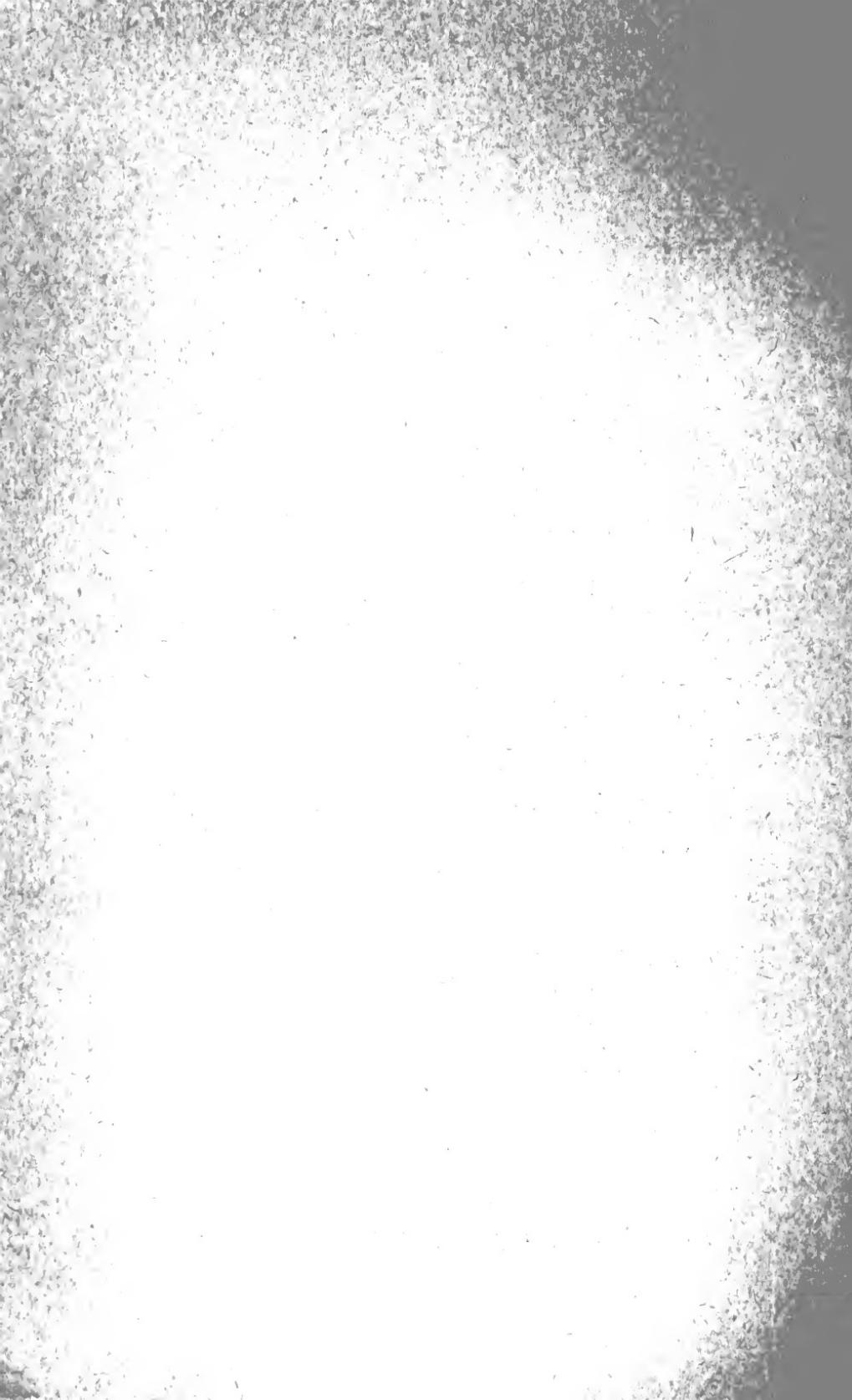
REUBEN G. LENSKE,
Yeon Bldg., Portland, Ore.,
Attorney for Appellant.

VAN DYKE & HARRIS,
Calif.-Western States Life Bldg.,
Sacramento, Calif.
Attorneys for Appellee.

FILED

MAR 2 7 1943

PAUL P. O'BRIEN,
CLERK



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In the United States
Circuit Court of Appeals
For the Ninth Circuit

H. A. PIERCE,

Appellant,

vs.

ALBERT L. WAGNER,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the Northern District of California,
Northern Division.

The gist of the first point in Appellee's Brief appears on page 2 thereof. Appellee contends that negligence is not pleaded and that in a complaint against an attorney for negligence, it is insufficient to allege negligence in general terms. In support of that contention Appellee cites *Feldesman v. McGovern*, 44 Cal.

App. (2d) 566. In that case the State Court holds that in an action by a client against his attorney the plaintiff must show that if the attorney had performed the act complained of it would have resulted beneficially to the plaintiff. That particular case is one where an attorney had failed to file a petition for discharge on behalf of a bankrupt. The Court held that the bankrupt may not have been entitled to and might not have obtained the discharge, even though the petition for discharge had been filed. In reply we make the following points:

1. That decision was in the State Court where pleadings:
 - (a) Are insufficient if made in general terms.
 - (b) Are strictly construed against the pleader on demurrer.
2. The rules of procedure in the Federal Court provide for
 - (a) Pleading in general terms.
 - (b) Liberal construction in behalf of the pleader.
3. There are sufficient allegations in plaintiff's complaint to show that the results and sums sought would have inured to the benefit of the plaintiff if defendant had not breached his agreement and duty.

Following are some authorities together with sustaining quotations in support of these points:

38 Col. Law Review 1179.

"The object of the complaint is to indicate to the defendant which grievance is being pressed."

DeLoach v. Crowley's, 128 Fed. (2d) 378, 380 (C.C.A. 5th Cir.).

"But the principle is no longer of force that pleadings will be construed strictly against the pleader. Rule 8(f) says that 'all pleadings shall be so construed as to do substantial justice.' Just what this means is not clear, but it excludes requiring technical exactness, or the making of refined inferences against the pleader, and requires an effort fairly to understand what he attempts to set forth."

Pliner v. Nesvig, et al., (D.C., W.D. Wis.) 42 F. Supp. 297, 298.

"A complaint must be liberally construed in favor of the pleader."

Sparks vs. England, 113 Fed. (2d) 579, 581 (C. C.A. 8th Cir.).

"The rules of Civil Procedure do not require that a plaintiff shall plead every fact essential to his right to recover the amount which he claims. The requirement is 'a short and plain statement of the claim showing that the pleader is entitled to relief,' and 'a demand for judgment for the relief to which he deems himself entitled.' Rule 8 (a) (2) and (3), 28 U.S.C.A., following Sec. 723 (c). The appendix of forms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments. This court has consistently disapproved of the practice of terminating litigation believed to be without merit, by the dismissal of complaints for informality or insufficiency of statement. See Leimer v. State Mutual Life Assurance Co., (8th Cir.), 108 F. (2d) 302, 305. If it is conceivable that, under the allegations of his complaint, a plaintiff can, upon a trial, establish a case which would entitle him to the relief prayed for, a motion to dismiss

for insufficiency of statement ought not to be granted. See and compare *Donelly Garment Co. v. Int. Ladies' Gar.* (8th Cir.), 99 F. (2d) 309, 312."

Securities & Exch. Com. vs. Timetrust, Inc., 28 Fed. Supp. 34, 41 (D.C., N.D. Cal. S.D. 1939).

"The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required. Pleadings shall be so construed as to do substantial justice."

Van Dyke v. Broadhurst, 28 Fed. Supp. 737, 740 (D.C. M.D. Penn. 1939).

"Under the present liberal construction of the Rules of Civil Procedure, to avoid dismissal for failure to state a claim upon which relief may be had, it is necessary only to allege sufficient facts to apprise the opposing party of the nature of the claim which will be proved. Technicalities in pleading are no longer observed."

Tahir Erk v. Glenn L. Martin Co., 116 F. (2d) 865, 869 (C.C.A. 4th Cir.).

"We are mindful that in weighing the validity of a motion to dismiss for insufficiency, the duty of the court is not to test the final merit of the claim in order to determine which party is to prevail. Our duty, rather, is to consider whether in the light most favorable to the plaintiff, and with every intendment regarded in his favor, the complaint is sufficient to constitute a valid claim. See *Karl Kiefer Mach. Co. v. United States Bottlers Machinery Co.* (7th Cir. 1940), 113 F. (2d) 356, 357; *Leimer v. State Mut. Life Assur. Co.*, supra, 108 Fed. (2d) 302 at page 304. See also *Bayley & Sons, Inc. v. Blumberg* (2d Cir. 1918), 254 F. 696, 698. We are of the opinion that, under such

a consideration, the complaint states a claim for breach of contract and, consequently, that the defendant's motion to dismiss was erroneously granted."

Hannah v. Gulf Power Co. (C.C.A. 5th Cir.), 128 F. (2d) 930, 931.

"The wrong and injury were done in Florida, and the court below was sitting in that state; but, although the local substantive law governs, we are not bound by the Florida rule that pleadings are to be construed most strongly against the pleader."

"Construing the complaint, as required by the New Rules, so as to do speedy and substantial justice, we find that the death of appellant's husband was caused by the concurrent negligence of appellee and said telephone company."

See also

28 U.S.C.A., Title 28 foll. Sec. 723c, commencing page 404.

Hardin v. Interstate Motor Freight System (D. C. Ohio 1939), 26 F. Supp. 97.

Hollander v. Davis, 120 Fed. (2d) 131 (C.C.A. 5th Cir.).

ARGUMENT

Let us look at the amended complaint which commences on page 14 of the Transcript of Record. Paragraph XII, which appears on page 19 of the Transcript, reads as follows:

"That as a result of said wrongful, negligent and improper conduct of defendant, said Reuben

G. Lenske suffered pecuniary loss in that he had to and did expend time and money in making numerous trips to Sacramento and in that he failed to receive his full portion of the fees in connection with the said estate and property, *and in that the amount of money available for fees for him was less than that which he would otherwise have received*, all to his damage and loss in the sum of \$2920.80 as is more specifically set forth herein."

Paragraph XIII on page 19 of the Transcript of Record shows that Reuben G. Lenske expended \$189.30 on account of the failure of defendant to carry out his agreement.

Paragraph XIV alleges that \$900.00 is a reasonable sum for attorney's fees and covers the time expended by him on account of defendant's breach.

Paragraph XVI shows that defendant collected \$705.00 in fees, of which Reuben G. Lenske was entitled to one-half under the agreement. Certainly no more pleading should be necessary on that.

In paragraph XX on page 21 of the Transcript of Record is the allegation:

"That by virtue of the premises \$1440.14 was paid out and disbursed to or for the delivery of the missing heir, which would otherwise inure to the benefit of all of the other heirs and a portion thereof would have inured to fees to Reuben G. Leniske."

In Paragraph XXI on page 22 we find the allegation:

"That should and would not have been necessary had defendant performed his agreement."

In Paragraph XXII there is the allegation:

"The net amount of fees to Reuben G. Lenske was less than it would and should have been by the sum of \$950.00."

Going to the second cause of action we find the following in Paragraph V at the bottom of page 23 of the Transcript of Record:

"That by virtue of the premises the following sums were paid out of said estate that *should and would have inured* to the five persons hereinabove mentioned, including plaintiff."

Again in Paragraph VIII on page 24 we find the following:

"That by virtue of the premises various other disbursements were made out of said estate that *would and should have been disallowed if defendant had diligently carried out said agreement.*"

Also, the second cause realleges all of the allegations of the first cause and therefore the quotations from the first cause would apply to the second cause.

It is submitted that under the liberal construction to be given pleadings under the foregoing authorities, the allegations were sufficient to apprise defendant of plaintiff's claim that it was the breach of defendant that caused the plaintiff to lose the sums mentioned, and that plaintiff would have received those sums if defendant had performed his agreement.

On page 3 of defendant's brief he contends that plaintiff's first cause of action is not sustainable at all on the ground that an attorney is liable to his client

for negligence but not to a third party. Of course, there must be some privity of contract in order to give rise to a cause of action. What closer privity can there be between two parties to a cause of action than the ones who entered into the agreement? The first cause is based upon a direct agreement between Reuben G. Lenske and Albert L. Wagner. It should not take much argument to point out that Reuben G. Lenske is not a third party but is one of the two contracting parties. Obviously, where two attorneys have agreed to divide equally certain fees, the failure upon the part of one to carry out that agreement is actionable by the other. The same is true as to breach of other phases of the agreement.

It is respectfully submitted that under the procedure now in force in the Federal Court the issues in this case should be determined upon the evidence and not upon the manner of pleading.

REUBEN G. LENSKE,
Attorney for Plaintiff-Appellant.

No. 10339

United States
Circuit Court of Appeals
For the Ninth Circuit.

HUGO VON SEGERLUND, ALICE VON SEGERLUND, FLORENCE KEE BROWN, JOHN A. FREAR, JOHN S. CROSS, VALERIA C. PAINTER, WILLIAM PIETSCH, D. F. HANLEY, BERTHA NELSON, ALMA C. SWENSON, FREDERICK R. COOK, JOSEPHINE KAISER, BEATRICE RUMMELLE, JOHN J. MCFARLANE, ADA S. MACKEY, JAMES P. MACKEY, JR., AMY SIMPSON, ADELAIDE G. STURGIS, MARGARET BELL FITZPATRICK, MABEL P. TRAVIS, ELIZA J. FULTON, MARGARET MINNICK, NELLIE NELSON LEE, IDA SWENSON, BERTHA KENNISTON, S. H. KENNISTON, CAROLINE A. WILDE, MRS. AUGUST DRESCH, HENRY A. KULHA, LEONIA E. KULHA, ALBERT G. LOELIKE, REINHOLDT A. WOLTER, ADELINA B. WOLTER, SILAS WHITCOMB, W. H. BORTON, HENRIETTA BERNITT, VIRGINIA MAGALE COSHOTT, JOSIE C. IDE, by W. H. BORTON, her attorney in fact, and AMBROSIA INVESTORS' COMPANY, INC., a corporation,

Appellants,

vs.

STELLA DYSART, individually and STELLA DYSART, also doing business as the Ambrosia Club and the Mutual Land Owners, Limited,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

APR 3 - 1943



United States
Circuit Court of Appeals
For the Ninth Circuit.

HUGO VON SEGERLUND, ALICE VON SEGERLUND, FLORENCE KEE BROWN, JOHN A. FREAR, JOHN S. CROSS, VALERIA C. PAINTER, WILLIAM PIETSCH, D. F. HANLEY, BERTHA NELSON, ALMA C. SWENSON, FREDERICK R. COOK, JOSEPHINE KAISER, BEATRICE RUMMELLE, JOHN J. MCFARLANE, ADA S. MACKEY, JAMES P. MACKEY, JR., AMY SIMPSON, ADELAIDE G. STURGIS, MARGARET BELL FITZPATRICK, MABEL P. TRAVIS, ELIZA J. FULTON, MARGARET MINNICK, NELLIE NELSON LEE, IDA SWENSON, BERTHA KENNISTON, S. H. KENNISTON, CAROLINE A. WILDE, MRS. AUGUST DRESCH, HENRY A. KULHA, LEONIA E. KULHA, ALBERT G. LOELIKE, REINHOLDT A. WOLTER, ADELINA B. WOLTER, SILAS WHITCOMB, W. H. BORTON, HENRIETTA BERNITT, VIRGINIA MAGALE COSHOTT, JOSIE C. IDE, by W. H. BORTON, her attorney in fact, and AMBROSIA INVESTORS' COMPANY, INC., a corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

L. H. PHILLIPS and
RUPERT B. TURNBULL, Esqs.

210 West 7th Street
Los Angeles, California

For Appellee:

HIRAM E. CASEY and
S. BERNARD WAGER, Esqs.

548 S. Spring Street
Los Angeles, California [1*]

*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the District Court of the United States
For the Southern District of California
Central Division

No. 38877-M In Bankruptcy

In the Matter of

STELLA DYSART, individually and STELLA
DYSART, also doing business as the AM-
BROSIA CLUB and the MUTUAL LAND
OWNERS, LIMITED,

Alleged Bankrupt.

INVOLUNTARY PETITION BY SIX
CREDITORS

To the Honorable Judges of the District Court of
the United States:

The verified petition filed by Hugo Von Segerlund,
Alice Von Segerlund, Florence Kee Brown,
John A. Frear, John S. Cross, and Valeria C.
Painter respectfully represents:

I.

That Hugo Von Segerlund, Alice Von Segerlund,
Florence Kee Brown, John A. Frear, John S.
Cross and Valeria C. Painter are residents of the
County of Los Angeles, State of California.

II.

That Stella Dysart is an individual, and also doing
business as Stella Dysart, also doing business
as Ambrosia Club and Mutual Land Owners,

Limited, and has her principal place of business in the City of Los Angeles, County of Los Angeles, State of California; that she has for the greater portion of six months preceding the filing of the Petition had her principal place of business in the City of Los Angeles, County of Los Angeles, State of California and District as aforesaid, and owes debts in excess of One Thousand (\$1,000.00) Dollars, and is a business organization, and is not a municipal, railroad, insurance or banking corporation; that the said Stella Dysart, individually, and Stella Dysart also doing business as Ambrosia Club and the Mutual Land Owners, Limited, is engaged in the business of selling real estate and supposedly oil bearing lands, and also dealing in oil leases, etc. [2]

III.

That petitioners are creditors of alleged bankrupt, having probable claims in the aggregate in excess of Five Hundred (\$500.00) Dollars, and holding no securities therefor.

IV.

That your petitioners, Hugo Von Segerlund, Alice Von Segerlund, Florence Kee Brown, John A. Frear, John S. Cross and Valeria C. Painter, are creditors of the above named alleged bankrupt, Stella Dysart, individually, and Stella Dysart, doing business as the Ambrosia Club and the Mutual Land Owners, Limited, having provable claims against the said alleged bankrupt amounting to the

sum of Seventeen Hundred twenty five and no/100 (\$1725.00) Dollars.

V.

That the nature and amounts of petitioners' claims are as follows:

That the said Hugo Von Segerlund and Alice Von Segerlund loaned to the said alleged bankrupt, Stella Dysart, the following sums on the respective dates as follows:

April 26, 1939	\$ 50.00
May 23, 1939	\$100.00

which the said alleged bankrupt agreed to immediately repay, but has failed and neglected to do so, and that no part thereof has been paid, though duly demanded.

That the said Alice Von Segerlund loaned to the said Stella Dysart, alleged bankrupt, the following sums on the following dates, to-wit:

September 25, 1937	\$100.00
May 31, 1938	\$100.00
May 24, 1939	\$100.00
September 15, 1939	\$100.00

which said alleged bankrupt agreed to immediately repay, but has failed and neglected to do so, and that no part thereof has been [3] paid, though duly demanded.

That the said Florence Kee Brown delivered cash to the said Stella Dysart in the sum of Five Hundred (\$500.00) Dollars within two years last past; that said Stella Dysart stated and represented that

she would deliver to your petitioner certain documents or papers which would show she had an interest in the Mutual Land Owners, Limited, but that the said Stella Dysart has not returned said money to your petitioner or delivered any documents or papers showing any interest in said Mutual Land Owners, Limited; that there is now due, owing and unpaid to the said Florenee Kee Brown from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart, the sum of Five Hundred (\$500.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That your petitioner John A. Frear and his wife Anna B. Frear loaned to the said alleged bankrupt Stella Dysart, the following sums on the respective dates, to-wit:

August 19, 1938	\$ 50.00
September 3, 1938	\$100.00
September 29, 1938	\$150.00

which said alleged bankrupt agreed to immediately repay, but has failed and neglected to do so; that no part thereof has been paid; that the said Anna B. Frear did for valuable consideration on the 22nd day of January 1940, assign her said claim against the said Stella Dysart, alleged bankrupt, to John A. Frear, petitioner herein who is now the owner and holder of said claim; that no part thereof has been paid and that the whole thereof is still due, owing and unpaid to the said John A. Frear.

That your petitioner John S. Cross delivered

cash to the said Stella Dysart in the sum of Two Hundred Fifty (\$250.00) Dollars within two years last past; that the said Stella Dysart stated and [4] represented to your petitioner that she would deliver a deed to your petitioner for one-half acre of land in McKinley County State of New Mexico, the description of which petitioner does not at this time know, but that the said Stella Dysart has failed and neglected to deliver to the said petitioner, said deed, or to return said money to petitioner; that there is now due, owing and unpaid to the said John S. Cross on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of Two Hundred Fifty (\$250.00) Dollars.

That your petitioner Valeria C. Painter delivered cash to the said Stella Dysart in the sum of One Hundred twenty-five (\$125.00) Dollars within two years last past; that the said Stella Dysart stated and represented to your petitioner that she would deliver a deed to your petitioner for one-quarter acre of land in McKinley County, State of New Mexico, the description of which petitioner does not at this time know, but that the said Stella Dysart has failed and neglected to deliver to the said petitioner, said deed, or to return said money to petitioner; that there is now due, owing and unpaid to the said Valeria C. Painter on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of One Hundred Twenty-five (\$125.00) Dollars.

VI.

That the said alleged bankrupt has committed an act of bankruptcy in that she did, while insolvent and within four months next preceding the filing of the Petition herein, to-wit: on the 5th day of May, 1941, suffered and permitted while so insolvent, a creditor to procure a Writ of Execution, and did levy by virtue of said writ emanating from a lien upon the said alleged bankrupt's property, and by virtue of said lien, a writ of execution was issued as aforesaid and levy made on property belonging to said alleged bankrupt through legal proceedings, and that the Sheriff of [5] McKinley County, State of New Mexico, did on the 9th day of June 1941, levy upon properties and assets belonging to the said Stella Dysart to satisfy a judgment which was prosecuted against the said Stella Dysart by one Mary T. Christensen, upon which there is now due a total of approximately Twelve Hundred eighty-three (\$1283.83) Dollars; that said alleged bankrupt has further permitted a judgment to be taken against her in the approximate sum of Eleven Hundred (\$1100.00) Dollars by one E. H. Youngblood, and that the same is a lien upon all of certain properties described as section 14 Township 14 north Range 10 West, McKinley County, State of New Mexico; that said levy of execution as aforesaid was made on the 9th day of June 1941 and that the Sheriff has given notice of the execution sale to take place on July 7, 1941, and that said alleged bankrupt not having vacated or discharged

such lien within thirty (30) days from date thereof or at least five days before the date set for the said sale or other disposition of said property, and that there is now due, owing and unpaid on the Mary T. Christensen judgment the approximate sum of \$1283.83, together with additional sums incurred as costs therein, the exact amount of which your petitioners do not at this time know; that said alleged bankrupt Stella Dysart has likewise failed and neglected to vacate or discharge the lien by virtue of the E. H. Youngblood judgment, in approximately the sum of \$1100.00, which said judgment is likewise a lien upon the alleged bankrupt's property, and she not having vacated or discharged such lien within thirty (30) days from the date thereof; that said judgments are still unpaid and are liens on the property of the said alleged bankrupt above described; that these petitioners are informed and believe, and therefore aver that the said alleged bankrupt owes in excess of Forty Thousand (\$40,000.00) Dollars, and her assets have an approximate value not to exceed Twenty Thousand (\$20,000.00) Dollars; that your petitioners are [6] informed and believe and therefore aver that other creditors are about to institute attachment proceedings against the alleged bankrupt and her alleged assets, and that in order to avoid a multiplicity of litigation, all of said proceedings should be handled in the within bankruptcy proceedings; that your petitioners aver that the said bankrupt failed and neglected to pay the taxes on her prop-

erty since 1935, and that as a result, said property as above described, was to be sold on December 4, 1939, for delinquent taxes; that your petitioners aver that the said alleged bankrupt admitted that she was unable to pay her taxes on the 29th day of November, 1939, in the sum of Two hundred fifty-seven and 49/100 (257.49) Dollars; that your petitioners herein, and other creditors of the alleged bankrupt paid the taxes on said alleged bankrupt's property on or about the 29th day of November, 1939, amounting to Two Hundred fifty-seven and 49/100 (\$257.49) Dollars, which the said alleged bankrupt agreed to repay, but that no part has been repaid, notwithstanding demand for same upon said alleged bankrupt; that your petitioners and other creditors have assigned their claim for taxes, for the purpose of collection of said taxes from the said alleged bankrupt, and that an action having been filed in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, entitled "William H. Borton, plaintiff versus Stella Dysart, defendant" action number 580-641 praying for the sum of Seven Hundred forty-three and 47/100 (\$743.47), for the payment of said taxes as aforesaid, and that a writ of execution was issued out of said Municipal Court as aforesaid on or about the 26th day of April, 1941; your petitioners are informed and believe and therefore aver that certain assets of the alleged bankrupt were attached on or about the said 26th day of April 1941. [7]

Wherefore, petitioners pray that the said Stella Dysart, be adjudicated a bankrupt as provided by the United States Bankruptcy law and the Acts of Congress relating to bankruptcy, and that she be adjudged by the Court to be a bankrupt within the purview of said acts, and for such other and further relief as may seem meet and proper to the Court.

HUGO VON SEGERLUND
ALICE VON SEGERLUND
FLORENCE KEE BROWN
JOHN A. FREAR
JOHN S. CROSS
VALERIA C. PAINTER

RUPERT B. TURNBULL,
L.H.P., and

L. H. PHILLIPS

By L. H. PHILLIPS

Attorneys for Petitioning
Creditors.

(Duly verified.)

[Endorsed]: Filed Jul. 5, 1941. [8]

[Title of District Court and Cause.]

PETITION OF CREDITORS TO INTERVENE
AND SUPPLEMENTAL INVOLUNTARY
PETITION BY CREDITORS.

To the Honorable Judges of the District Court of
the United States:

The verified petition of William Pietsch, D. F.
Hanley, Bertha Nelson, Alma C. Swenson, Freder-

ick R. Cook, Josephine Kaiser, Beatrice Rummelle, John J. McFarlane, Ada S. Mackey, James F. Mackey, Jr., Amy Simpson, Adelaide G. Sturgis, Margaret Bell Fitzpatrick, Mabel P. Travis, Eliza J. Fulton, Margaret Minnick, Nellie Nelson Lee, Ida Swenson, Bertha Kenniston, S. H. Kenniston, Caroline A. Wilde, Mrs. August Dresch, Henry A. Kulha, Leonia E. Kulha, husband and wife, Albert G. Loellke, Reinholdt A. Wolter and Adeline R. Wolter, husband and wife, and Silas Whitcomb, respectfully alleges and shows:

I.

That William Pietsch, D. F. Hanley, Bertha Nelson, Alma C. Swenson, Frederick R. Cook, Josephine Kaiser, Beatrice Rummelle, John J. McFarlane, Ada S. Mackey, James F. Mackey, Jr., Amy Simpson, Adelaide G. Sturgis, Margaret Bell Fitzpatrick, Mabel P. Travis, Eliza J. Fulton, Margaret Minnick, Nellie Nelson Lee, Ida Swenson, Bertha Kenniston, S. H. Kenniston, Caroline A. Wilde, Mrs. August Dresch, Henry A. Kulha, Leonia E. Kulha, husband and wife, Albert G. Loellke, Reinholdt A. Wolter and Adeline R. Wolter, husband and wife, and Silas Whitcomb are residents of the County of Los Angeles, State of California, and are all creditors of the above named alleged bankrupt, Stella Dysart, [12] individually and Stella Dysart doing business as Ambrosia Club and Mutual Land Owners, Limited, and having provable claims against the said alleged bankrupt

amounting to the sum of \$4953.00 in excess of any securities held by them.

II.

That the said Stella Dysart is an individual and also doing business as Stella Dysart, individually, and Stella Dysart doing business as Ambrosia Club and Mutual Land Owners, Limited, and has her principal place of business in the City of Los Angeles, County of Los Angeles, State of California; that she has for the greater portion of six months preceding the filing of the petition, had her principal place of business and resided at 4111 Trinity Street, in the City of Los Angeles, County of Los Angeles, State of California, and District as aforesaid, and owes debts in excess of One Thousand (\$1,000.00) Dollars, and is a busines organization and is not a municipal, railroad, insurance or banking corporation; that the said Stella Dysart, individually, and Stella Dysart also doing business as Ambrosia Club and Mutual Land Owners, Limited, is engaged in the business of selling real estate and supposedly oil bearing land and also dealing in oil leases, etc.

III.

That the petitioners are creditors of the alleged bankrupt, having provable claims in the aggregate in excess of Five Hundred (\$500.00) Dollars and holding no securities therefor.

IV.

That the nature and amounts of petitioners' claims are as follows:

That the said William Pietsch delivered cash to the said Stella Dysart in the sum of One Thousand (\$1,000.00) Dollars, at her special instance and request, within four years last past; that the said Stella Dysart stated and represented that she would deliver to your petitioner certain documents or papers which [13] would show he had an interest in the Mutual Land Owners, Limited and an interest in the Northern Oil Company, but that the said Stella Dysart has not returned said money to your petitioner or delivered any documents or papers showing any interest in said Mutual Land Owners, Limited or the Northern Oil Company; that there is now due, owing and unpaid to the said William Pietsch from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of One Thousand (\$1,000.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said D. F. Hanley delivered cash to the said Stella Dysart in the sum of Five Hundred (\$500.00) Dollars, at her special instance and request, on or about the 24th day of December, 1937; that the said Stella Dysart stated and represented that she would deliver to your petitioner certain documents which would show he had an interest in the Mutual Land Owners, Limited, but that the said

Stella Dysart has not returned said money to your petitioner or delivered any documents or papers showing any interest in said Mutual Land Owners, Limited; that there is now due, owing and unpaid to the said D. F. Hanley from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of Five Hundred (\$500.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said Bertha Nelson delivered cash to the said Stella Dysart in the sum of Four Hundred Two (\$402.00) Dollars, at her special instance and request, between March 8, 1938 and April 15, 1938, both inclusive; that the said Stella Dysart stated and represented that she would deliver to your petitioner certain documents or papers for Four Hundred (\$400.00) Dollars of said sum [14] which would show she had an interest in the Mutual Land Owners, Limited, and Two (\$2.00) Dollars of said sum for recording her said interest, but that the said Stella Dysart has not returned said money to your petitioner or delivered any documents or papers showing any interest in said Mutual Land Owners, Limited or for recording said document; that there is now due, owing and unpaid to the said Bertha Nelson from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of Four Hundred

Two (\$402.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said Alma C. Swenson delivered cash to the said Stella Dysart in the sum of Four Hundred Seventy-seven (\$477.00) Dollars, at her special instance and request, on the following dates, to-wit:

March 4, 1938	\$102.00
June 3, 1938	50.00
March 6, 1939	25.00
April 24, 1939	100.00
June 20, 1939	100.00
September 15, 1939	100.00

Of said above sum your petitioner loaned the said Stella Dysart, at her special instance and request, the sum of Three Hundred Two (\$302.00) Dollars, which the said Stella Dysart agreed to repay the same immediately but has failed, neglected and refused, and still fails, neglects and refuses to repay same; that the sum of One Hundred Fifty (\$150.00) Dollars, paid June 3, 1938 and June 20, 1939 the said Stella Dysart stated and represented she would deliver to your petitioner certain documents and papers which would show she had an interest in the Mutual Land Owners, Limited, and an interest in a certain dry ice manufacturing plant in the State of Utah and an interest in an oil well she was drilling in [15] the State of Utah, but that the said Stella Dysart has not returned said money to your petitioner or delivered any documents or papers showing any interest in said Mutual Land

Owners, Limited or the dry ice manufacturing plant or an interest in any oil well; that of the above total sum set forth, your petitioner delivered to the said Stella Dysart Twenty-five (\$25.00) Dollars, at her special instance and request, to pay taxes on three (3) acres of land located in McKinley County, New Mexico, but that the said Stella Dysart has failed and neglected to pay said taxes or to return said money to your petitioner; that there is now due, owing and unpaid to the said Alma C. Swenson from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart, at her special instance and request, the sum of Four Hundred Seventy-seven (\$477.00) Dollars, as aforesaid, no part of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said Frederick R. Cook delivered cash to the said Stella Dysart in the sum of Two Hundred Ninety-one and 50/100 (\$291.50) Dollars, at her special instance and request, between December 2, 1938 and February 6, 1940, both inclusive, of said sum as aforesaid your petitioner loaned to the said Stella Dysart the sum of Sixty-five (\$65.00) Dollars, which the said Stella Dysart promised she would immediately repay, but has failed and neglected to repay the same; that the said Stella Dysart stated and represented that she would deliver to your petitioner a deed for one-fourth ($\frac{1}{4}$) of an acre of land in McKinley County, State of New Mexico, for One Hundred Twenty-five (\$125.00) Dollars from the moneys delivered to the

said Stella Dysart as aforesaid, and a deed for one-eighth ($\frac{1}{8}$) of an acre of land in said McKinley County, State of New Mexico for Fifty (\$50.00) Dollars from the moneys so paid to Stella Dysart as aforesaid, but that the said Stella Dysart has failed and neglected to deliver deeds [16] for said lands to your petitioner; that the said Stella Dysart further stated and represented that she would deliver to your petitioner for Fifty (\$50.00) Dollars from said moneys paid to said Stella Dysart, as aforesaid, an interest in a certain dry ice manufacturing plant in the State of Utah and an interest in an oil well, but that the said Stella Dysart has failed and neglected to deliver any interest in said dry ice manufacturing plant or oil well and has not returned said money to your petitioner or delivered any documents or papers showing any interest in said dry ice manufacturing plant and oil well; that the said Stella Dysart further stated and represented that from the moneys delivered by your petitioner as aforesaid to said Stella Dysart, the sum of one and 50/100 (\$1.50) Dollars was to pay the taxes on the land Stella Dysart agreed to deliver deeds for, but that said Stella Dysart has failed and neglected to pay said taxes or to return to your petitioner the sum of \$1.50; that there is now due, owing and unpaid to the said Frederick R. Cook from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of Two Hundred Ninety-one and 50/100 (\$291.50) Dollars, no part

of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said Josephine Kaiser delivered cash to the said Stella Dysart in the sum of Four Hundred Ninety (\$490.00) Dollars, at her special instance and request, between March 15, 1938 and November 1, 1939, both inclusive; for Two Hundred Fifty (\$250.00) Dollars delivered as aforesaid to said Stella Dysart the said Stella Dysart stated and represented that she would deliver to your petitioner certain documents or papers which would show she had an interest in a certain dry ice manufacturing plant in the State of Utah and an interest in an oil well, but that the said Stella Dysart has not delivered any documents or [17] papers showing any interest in said dry ice manufacturing plant or oil well to your petitioner and has not returned said money to your petitioner; Forty (\$40.00) Dollars of the above sum as aforesaid, at the special instance and request of the said Stella Dysart, was loaned to her, which she agreed to immediately repay, but has failed and neglected to repay same or any part thereof; Two Hundred (\$200.00) Dollars from said money so delivered to the said Stella Dysart, as aforesaid, the said Stella Dysart stated and represented to your petitioner that she would deliver a deed to one-half ($\frac{1}{2}$) acre of land located in the County of McKinley, State of New Mexico, but that the said Stella Dysart has failed and neglected to deliver a deed to said land or to return said money; that there is now due, owing and unpaid to the said Josephine Kaiser from the said

Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart, at her special instance and request, the sum of Four Hundred Ninety (\$490.00) Dollars, no part of which has been paid and that the same thereof is now wholly due, owing and unpaid.

That the said Beatrice Rummelle delivered cash to the said Stella Dysart in the sum of One Hundred Forty (\$140.00) Dollars, at her special instance and request, between June 15, 1938 and January 23, 1939, both inclusive, and that the said Stella Dysart stated and represented that for said sum she would deliver to your petitioner certain documents or papers which would show she had an interest in a certain dry ice manufacturing plant and an interest in an oil well, and also stated and represented that she would deliver deeds to your petitioner for two (2) certain parcels of real property situated in the County of McKinley, State of New Mexico, to-wit, one-eighth ($\frac{1}{8}$) acre and one-half ($\frac{1}{2}$) acre, but that the said Stella Dysart has not returned said money to your petitioner or delivered any documents or papers showing any interest in any dry ice manufacturing plant or oil well, or did [18] she deliver any deeds to said land; that there is now due, owing and unpaid to the said Beatrice Rummelle the sum of One Hundred Forty (\$140.00) Dollars on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said John J. McFarlane delivered cash to the said Stella Dysart, at her special instance and request, in the sum of One Hundred (\$100.00) Dollars within the last four years past; that the said Stella Dysart stated and represented that she would deliver to your petitioner certain documents or papers which would show he had an interest in a certain Utah dry ice manufacturing plant and an interest in an oil well, but that the said Stella Dysart has not returned said money to your petitioner or delivered any documents or papers showing any interest in the Utah dry ice manufacturing plant or an interest in an oil well; that there is now due, owing and unpaid to the said John J. McFarlane from said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of One Hundred (\$100.00) Dollars, no part of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said Ada S. Mackey and James F. Mackey, Jr. delivered cash to the said Stella Dysart, at her special instance and request, in the sum of One Hundred Five (\$105.00) Dollars between September 21, 1938 and December 23, 1938, both inclusive; that the said Stella Dysart stated and represented that she would deliver to your petitioners deeds to two (2) parcels of real property situate in the County of McKinley, State of New Mexico, to-wit, two (2) one-eighth ($\frac{1}{8}$) acres of land, but that the said Stella Dysart has not deliv-

ered said deeds to your petitioners or returned said money; that there is now due, owing and unpaid to Ada S. Mackey and James F. Mackey, Jr. from the said Stella Dysart [19] on account of said moneys had and received and delivered to the said Stella Dysart, at her special instance and request, the sum of One Hundred Five (\$105.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said Amy Simpson delivered cash to the said Stella Dysart at her special instance and request in the sum of One Hundred Twenty-seven (\$127.00) Dollars, between September 21, 1938 and January 11, 1939, both inclusive, that the said Stella Dysart stated and represented that she would deliver to your petitioner a deed to one-fourth ($\frac{1}{4}$) acre of land situated in the County of McKinley, State of New Mexico, and likewise stated and represented that she would pay Two (\$2.00) Dollars for the recording of said deed from said sum as aforesaid, but that the said Stella Dysart has not delivered any deed to said property nor paid for the recording of any deed to said property, nor has she returned said money to your petitioner; that there is now due, owing and unpaid to the said Amy Simpson from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart, at her special instance and request, the sum of One Hundred Twenty-seven (\$127.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said Adelaide G. Sturgis delivered cash to the said Stella Dysart at her special instance and request, in the sum of One Hundred (\$100.00) Dollars on the 13th day of August, 1938; that the said Stella Dysart stated and represented that she would deliver to your petitioner certain documents or papers which would show that she had an interest in the Mutual Land Owners, Limited, but that the said Stella Dysart has not returned said money to your petitioner or delivered any documents or papers showing any interest in said Mutual Land Owners, Limited; that there is now due, owing and unpaid to the said Adelaide G. Sturgis from [20] the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of One Hundred (\$100.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said Margaret Bell Fitzpatrick delivered cash to the said Stella Dysart, at her special instance and request, in the sum of One Hundred (\$100.00) Dollars, on March 15, 1938, and that the said Stella Dysart stated and represented that for said sum she would deliver to your petitioner certain documents or papers which would show she had an interest in a certain Utah dry ice manufacturing plant and an interest in an oil well, but that the said Stella Dysart has not delivered any documents or papers showing any interest in said dry ice manufacturing plant or oil well; that there is now due, owing and unpaid to the said Margaret

Bell Fitzpatrick from said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of One Hundred (\$100.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said Mabel P. Travis delivered cash to the said Stella Dysart, at her special instance and request, in the sum of One Hundred Twenty-four (\$124.00) Dollars, between January 19, 1938 and April 26, 1939, both inclusive, that the said Stella Dysart stated and represented that she would deliver to your petitioner certain documents or papers which would show she had an interest in a certain Utah dry ice manufacturing plant and an interest in an oil well, for One Hundred and Twenty-two (\$122.00) Dollars of said sum paid to Stella Dysart as aforesaid, and that Two (\$2.00) Dollars of said amount so paid to Stella Dysart was for tax fund, but that the said Stella Dysart has not delivered any documents or papers showing any interest in the Utah dry ice [21] manufacturing plant or an interest in an oil well, or payment to tax fund, nor has said Stella Dysart returned said money to your petitioner; that there is now due, owing and unpaid to the said Mabel P. Travis from said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of One Hundred Twenty-four (\$124.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said Eliza J. Fulton delivered cash to the said Stella Dysart, at her special instance and request, in the sum of One Hundred Forty-four and 50/100 (\$144.50) Dollars between May, 1938 and September 7, 1938, both inclusive, that the said Stella Dysart stated and represented that she would deliver to your petitioner certain documents or papers which would show that she had an interest in the Mutual Land Owners, Limited, and an interest in a certain dry ice manufacturing plant in the State of Utah, and an interest in an oil well, but that the said Stella Dysart has failed and neglected to deliver any documents or papers showing any interest of petitioner in said Mutual Land Owners, Limited, or said Utah dry ice manufacturing plant or said oil well, and has not returned said money to your petitioner; that there is now due, owing and unpaid to the said Eliza J. Fulton from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of One Hundred Forty-four and 50/100 (\$144.50) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said Margaret Minnick delivered cash to the said Stella Dysart, at her special instance and request, in the sum of Two Hundred Twenty-five (\$225.00) Dollars, between January 6, 1938 and December 17, 1938, both inclusive, that the said Stella Dysart stated and represented to your peti-

tioner that she would [22] deliver to her certain documents or papers which would show that she had an interest in a certain dry ice manufacturing plant in the State of Utah and an interest in an oil well, but that the said Stella Dysart has failed and neglected to deliver any documents or papers showing any interest of petitioner in said Utah dry ice manufacturing plant or in said oil well, and has not returned said money to your petitioner; that there is now due, owing and unpaid to the said Margaret Minnick from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her special instance and request, the sum of Two Hundred Twenty-five (\$225.00) Dollars, no part of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said Nellie Nelson Lee delivered cash to the said Stella Dysart, at her special instance and request, in the sum of Twenty-six (\$26.00) Dollars, between June 7, 1938 and June 20, 1939, both inclusive, that the said Stella Dysart stated and represented to your petitioner that she would deliver to her certain documents or papers which would show that for Twenty-five (\$25.00) Dollars of said sum she had an interest in a certain dry ice manufacturing plant in the State of Utah and an interest in an oil well, and that One (\$1.00) Dollar of said sum was to pay for tax fund on said interest, but that the said Stella Dysart has failed and neglected to deliver any documents or papers

showing any interest of petitioner in said Utah dry ice manufacturing plant or interest in said oil well, or as payment to tax fund on said interest, and has not returned said money to your petitioner; that there is now due, owing and unpaid to the said Nellie Nelson Lee from the said Stella Dysart on account of said moneys had and received and delivered to said Stella Dysart at her special instance and request, the sum of Twenty-six (\$26.00) Dollars, no part of which has been paid and that the same thereof is wholly due, [23] owing and unpaid.

That the said Ida Swenson delivered cash to the said Stella Dysart, at her special instance and request, in the sum of One Hundred Fifty (\$150.00) Dollars, between May 4, 1938 and June 3, 1938, both inclusive, that the said Stella Dysart stated and represented to your petitioner that she would deliver to her certain documents or papers which would show an interest in a certain dry ice manufacturing plant in the State of Utah and an interest in an oil well, but that the said Stella Dysart has failed and neglected to deliver any documents or papers to your petitioner showing that she had an interest in said Utah dry ice manufacturing plant or an interest in said oil well, and has not returned said money to your petitioner; that there is now due, owing and unpaid to the said Ida Swenson from the said Stella Dysart on account of said moneys had and received and delivered to said Stella Dysart, at her special instance and re-

quest, the sum of One Hundred Fifty (\$150.00) Dollars, no part of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said Bertha Kenniston delivered cash to the said Stella Dysart, at her special instance and request, in the sum of Thirty (\$30.00) Dollars within four years last past; that the said Stella Dysart stated and represented to your petitioner that she would deliver to her certain documents or papers showing an interest in the Mutual Land Owners, Limited and the Northern Oil Company, but that the said Stella Dysart has failed and neglected to deliver any documents or papers showing any interest of petitioner in said Mutual Land Owners, Limited or said Northern Oil Company, and has not returned said money to your petitioner; that there is now due, owing and unpaid to the said Bertha Kenniston from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart at her [24] special instance and request, the sum of Thirty (\$30.00) Dollars, no part of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said S. H. Kenniston delivered cash to the said Stella Dysart, at her special instance and request, in the sum of Twelve and 50/100 (\$12.50) Dollars within four years last past, that the said Stella Dysart stated and represented to your petitioner that she would deliver to him certain documents or papers which would show that he had

an interest in a certain dry ice manufacturing plant in the State of Utah, and an interest in the Northern Oil Company, but that said Stella Dysart has failed and neglected to deliver any documents or papers showing any interest of petitioner in said Utah dry ice manufacturing plant or any interest in the Northern Oil Company, and has not returned said moneys to your petitioner; that there is now due, owing and unpaid to the said S. H. Kenniston from the said Stella Dysart on account of said moneys had and received and delivered to said Stella Dysart at her special instance and request, the sum of Twelve and 50/100 (\$12.50) Dollars, no part of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said Caroline A. Wilde delivered cash to the said Stella Dysart, at her special instance and request, in the sum of One Hundred Two (\$102.00) Dollars within four years last past, that the said Stella Dysart stated and represented to your petitioner that she would deliver to her certain documents or papers which would show that for One Hundred (\$100.00) Dollars of said sum she had an interest in a certain dry ice manufacturing plant in the State of Utah and an interest in a New Mexico oil well, and that Two (\$2.00) Dollars of said sum was for taxes and interest; but that the said Stella Dysart has failed and neglected to deliver any documents or papers showing any interest of petitioner in said Utah dry ice manufacturing plant or an interest in [25] a New

Mexican oil well, and has not returned said moneys to your petitioner; that there is now due, owing and unpaid to the said Caroline A. Wildey from the said Stella Dysart on account of said moneys had and received and delivered to said Stella Dysart at her special instance and request, the sum of One Hundred Two (\$102.00) Dollars, no part of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said Mrs. August Dresch delivered cash to the said Stella Dysart, at her special instance and request, in the sum of One Hunred (\$100.00) Dollars on March 15th, 1938, that the said Stella Dysart stated and represented to your petitioner that she would deliver to her certain documents or papers which would show that she had an interest in a certain dry ice manufacturing company and an interest in an oil well; but that the said Stella Dysart has failed and neglected to deliver any documents or papers showing any interest of petitioner in said dry ice manfacturing plant or an interest in any oil well, and has not returned said moneys to your petitioner; that there is now due, owing and unpaid to the said Mrs. August Dresch from the said Stella Dysart on account of said moneys had and received and delivered to said Stella Dysart at her special instance and request, the sum of One Hundred (\$100.00) Dollars, no part of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said Henry A. Kuhla and Leonia E.

Kuhla, husband and wife, delivered cash to the said Stella Dysart, at her special instance and request, in the sum of Thirty-two and 50/100 (\$32.50) Dollars, between November 17, 1938 and July 1, 1939, both inclusive, that the said Stella Dysart stated and represented to your petitioners that for Twenty-five (\$25.00) Dollars of said amount she would deliver to them certain documents or papers which would show that they had an interest in a [26] certain dry ice manufacturing plant in the State of Utah and an interest in an oil well, that One (\$1.00) Dollar of said amount was for tax fund, and from said amount your petitioners loaned the said Stella Dysart Six and 50/100 (\$6.50) Dollars for office fund; but that the said Stella Dysart has failed and neglected to delivery any documents or papers showing any interest of your petitioners in said Utah dry ice manufacturing plant or interest in an oil well, or as payment to tax fund, and has not returned said moneys to your petitioners; that there is now due, owing and unpaid to the said Henry A. Kuhla and Leonia E. Kuhla from the said Stella Dysart on account of said moneys had and received and delivered to said Stella Dysart at her special instance and request, the sum of Thirty-two and 50/100 (\$32.50) Dollars, no part of which has been paid and that the same thereof is wholly due, owing and unpaid.

That the said Albert G. Loellke delivered cash to the said Stella Dysart, at her special instance and request, in the sum of Forty-two (\$42.00) Dol-

lars, within four years last past, that the said Stella Dysart stated and represented that she would deliver to your petitioner a deed to one-eighth ($\frac{1}{8}$) acre of land situated in the County of McKinley, State of New Mexico, for Forty (\$40.00) Dollars of said amount and that she would pay Two (\$2.00) Dollars for the recording of said deed from said sum as aforesaid, but that the said Stella Dystart has not delivered any deed to said property nor paid for the recording of any deed to said property nor has she returned said moneys to your petitioner; that there is now due, owing and unpaid to the said Albert G. Loellke from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart, at her special instance and request, the sum of Forty-two (\$42.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid. [27]

That the said Reinholdt A. Wolter and Adeline R. Wolter, husband and wife, delivered cash to the said Stella Dysart, at her special instance and request, in the sum of One Hundred Thirty-two (\$132.00) Dollars, between January 20, 1938 and February 24, 1939, both inclusive, that the said Stella Dysart stated and represented that she would deliver to your petitioners a deed to one-fourth ($\frac{1}{4}$) acre of land situated in the County of McKinley, State of New Mexico, but that the said Stella Dysart has not delivered any deed to said property and has not returned said moneys to your

petitioners; that there is now due, owing and unpaid to the said Reinholdt A. Wolter and Adeline R. Wolter from the said Stella Dysart on account of said moneys had and received and delivered to the said Stella Dysart, at her special instance and request, the sum of One Hundred Thirty-two (\$132.00) Dollars, no part of which has been paid, and that the same thereof is wholly due, owing and unpaid.

That the said Silas Whitecomb loaned to the said alleged bankrupt Stella Dysart, between the 16th day of May, 1939 and the 25th day of July, 1939, both inclusive, the sum of Eighty (\$80.00) Dollars, which she agreed to immediately repay, but has failed and neglected to do so; that no part thereof has been paid although due demand has been made therefor, and that the whole sum thereof is now wholly due owing and unpaid.

V.

That on the 5th day of July, 1941, Hugo Von Segerlund, Alice Von Segerlund, Florence Kee Brown, John A. Frear, John S. Cross and Valeria C. Painter filed, in the office of the Clerk of this Court, a petition praying that the said Stella Dysart, individually, and Stella Dysart doing business as Ambrosia Club and Mutual Land Owners, Limited, be adjudged an involuntary bankrupt, which petition is still pending. [28]

VI.

That your petitioners as creditors desire to join in the proceedings herein and allege as follows:

That at all times herein mentioned and during the months of February, March, April, May and June, all of 1941, and during all of said times, the said Stella Dysart was insolvent; that while so insolvent the said Stella Dysart did permit a creditor, to-wit, Mary T. Christensen, to obtain a preference by legal proceedings in this, that Mary T. Christensen was a judgment creditor on the 7th, 8th, 9th days of June, 1941 and during all of the month of June, 1941 to and including the 7th day of July, 1941 that said Mary T. Christensen was a creditor of said Stella Dysart having her indebtedness fixed as to nature, extent and amount, to-wit, a judgment had been duly made, given and rendered in favor of Mary T. Christensen as a plaintiff and against Stella Dysart as a defendant, in the District Court of the State of New Mexico, for the County of McKinley, said judgment being in the sum of approximately Twelve Hundred Eighty-three and 83/100 (\$1283.83) Dollars; that on the 9th day of June, 1941 said Mary T. Christensen, a creditor, did procure and obtain a Writ of Execution upon the judgment aforesaid and placed the same in the hands of the Sheriff of McKinley County, State of New Mexico, and did cause the said Sheriff to levy and the Sheriff did levy upon property of the defendant Stella Dysart, did set the same for sale under said Writ of Execution for the 7th day of July, 1941 and on the 7th day of July, 1941 the said Sheriff of McKinley County, State of New Mexico, did sell to the highest and

best bidder, who was a person other than the said Stella Dysart, the said property of Stella Dysart in payment and in satisfaction of the said judgment in favor of Mary T. Christensen; that Stella Dysart did not within five (5) days prior to said sale vacate or cause to be vacated or discharged, and there was not discharged, [29] the lien of the levy of said Writ of Attachment and said property was sold on the date noticed, July 7th, 1941.

VII.

And for separate and second act of bankruptcy your petitioners, and each of them, allege that within four (4) months last past said Stella Dysart permitted a creditor, Mary T. Christensen, to obtain a preference by legal proceedings and said Mary T. Christensen, a creditor, did obtain a preference by legal proceedings in this, that on the 7th day of July, 1941 and while and at a time that Stella Dysart was insolvent and was known to be involvent by both Stella Dysart and Mary T. Christensen, and each of them, Stella Dysart permitted Mary T. Christensen to have, take and dispose of certain personal property consisting of pipe and oil well equipment situate in McKinley County, State of New Mexico, to apply upon the indebtedness then on July 7th, 1941 due from Stella Dysart to Mary T. Christensen, and Mary T. Christensen was then and there, on July 7th, 1941, a creditor, and then and there Mary T. Christensen took and obtained property of Stella Dysart to the value in

excess of One Thousand (\$1,000.00) Dollars, with the permission of said Stella Dysart, and then and there obtained a greater proportion of payment of her, Mary T. Christensen's, claim than did your petitioners; that then and there Mary T. Christensen obtained the sum in excess of One Thousand (\$1,000.00) Dollars, and that your petitioners have received no payments on their respective accounts and indebtednesses at all during four (4) months immediately preceding the filing of this petition; that said Mary T. Christensen on July 7th, 1941 had reason to believe and did know that said Stella Dysart was insolvent; that said Stella Dysart was on July 14th, 1941 insolvent, that the said conveyance and taking of the said personal property by Mary T. Christensen was done with the intent on the part of Stella Dysart to permit Mary T. Christensen to [30] obtain a preference, and said Mary T. Christensen did obtain a preference over and above your petitioners and each of them.

Wherefore, your intervening petitioners respectfully pray that they may be permitted to file this their intervening petition; that Stella Dysart be adjudicated a bankrupt within the purview of the Bankruptcy Acts and the amendments thereto, as provided by the United States Bankruptcy law and the Acts of Congress relating thereto; and that your petitioners be allowed to join in the petition of Hugo Von Segerlund, Alice Von Segerlund, Florence Kee Brown, John A. Frear, John S. Cross and Valeria C. Painter, to-wit, the petition

heretofore filed, and the Court make an Order permitting the intervention and the allowance of the filing of this petition and make its Order with appropriate provisions for the service of the process in respect to this intervention petition.

WILLIAM PIETSCH
D. F. HANLEY
BERTHA NELSON
ALMA C. SWENSON
FREDERICK R. COOK
JOSEPHINE KAISER
BEATRICE RUMMELLE
JOHN J. McFARLANE [31]
ADA S. MACKEY
JAMES F. MACKEY, Jr.
AMY SIMPSON
ADELAIDE G. STURGIS
MARGARET BELL FITZ-PATRICK
MABEL P. TRAVIS
ELIZA J. FULTON
MARGARET MINNICK
NELLIE NELSON LEE
IDA SWENSON
BERTHA KENNISTON
S. H. KENNISTON
CAROLINE WILDE
MRS. AUGUST DRESCH
HENRY A. KULHA
LEONIA E. KULHA [32]
ALBERT G. LOELLKE

REINHOLDT A. WOLTER
ADELINE R. WOLTER
SILAS G. WHITCOMB

Petitioners

RUPERT B. TURNBULL

L. H. PHILLIPS

Attorneys for Petitioning

Intervening Creditors.

(Duly Verified.)

[Endorsed]: Filed July 29, 1941. [33]

[Title of District Court and Cause.]

No. 38877-M

PETITION OF CREDITORS TO INTERVENE
AND SUPPLEMENTAL INVOLUNTARY
PETITION BY CREDITORS.

To the Honorable Judges of the District Court of
the United States:

The verified petition of W. H. Borton, Henrietta Bernitt, Florence Kee Brown, Silas G. Whitcomb, Ida Swenson, Virginia Magale Coshott, John Frear, Josie C. Ide, by W. H. Borton, her attorney in fact, Mrs. A. Von Segerlund, H. A. Kulha, Alma Swenson and Ambrosia Investors' Company, Inc., a corporation, respectfully alleges and shows:

I.

That W. H. Borton, Henrietta Bernitt, Florence Kee Brown, Silas G. Whitcomb, Ida Swenson, Vir-

ginia Magale Coshott, John Frear, Josie C. Ide, Mrs. A. Von Segerlund, H. A. Kulha, Alma Swenson are all residents of the County of Los Angeles, State of California, and Ambrosia Investors' Company, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of New Mexico, and authorized to do business in the State of California, and are all creditors of the above named alleged bankrupt, Stella Dysart individually and Stella Dysart doing business as Ambrosia Club and Mutual Land Owners, Limited, and have provable claims against the said alleged bankrupt amounting to the sum of \$683.77 in excess of any securities held by them.

II.

That the said Stella Dysart is an individual and also doing business as Stella Dysart, individually, and Stella Dysart doing business as Ambrosia Club and Mutual Land Owners, Limited, and has [48] her principal place of business in the City of Los Angeles, County of Los Angeles, State of California; that she has for the greater portion of six months preceding the filing of the petition, had her principal place of business and resided at 4111 Trinity Street, in the City of Los Angeles, County of Los Angeles, State of California, and District as aforesaid, and owes debts in excess of One Thousand (\$1,000.00) Dollars, and is a business organization and is not a municipal, railroad, insurance or banking corporation; that the said Stella

Dysart, individually, and Stella Dysart also doing business as Ambrosia Club and Mutual Land Owners, Limited, is engaged in the business of selling real estate and supposedly oil bearing land and also dealing in oil leases, etc.

III.

That the petitioners are creditors of the alleged bankrupt, having provable claims in the aggregate in excess of Five Hundred (\$500.00) Dollars and holding no securities therefor.

IV.

That the nature and amounts of petitioners' claims are as follows:

That the said W. H. Borton purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of Six (\$6.00) Dollars; that the alleged bankrupt collected from the said W. H. Borton the sum of \$6.00 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said W. H. Borton that she had paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said W. H. Borton paid the same in the sum of \$6.00; that there- [49] after

and in or about the month of November, 1939, the said alleged bankrupt agreed with the said W. H. Borton and did promise to pay said sum to him; that although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your said petitioner herein.

That the said Henrietta Bernitt purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of Eleven and 50/100 (\$11.50) Dollars; that the alleged bankrupt collected from the said Henrietta Bernitt the sum of \$11.50 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said Henrietta Bernitt that she had paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said Henrietta Bernitt paid the same in the sum of \$11.50; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said Henrietta Bernitt and did promise to pay said sum to her; that although demand has been made upon said alleged bankrupt for the pay-

ment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said Florence Kee Brown purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the [50] sum of Thirteen (\$13.00) Dollars; that the alleged bankrupt collected from the said Florence Kee Brown the sum of \$13.00 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said Florence Kee Brown that she had paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said Florence Kee Brown paid the same in the sum of \$13.00; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said Florence Kee Brown and did promise to pay said sum to her; that although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said Silas G. Whitcomb purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of Thirty-five and 75/100 (\$35.75) Dollars; that the alleged bankrupt collected from the said Silas G. Whitcomb the sum of \$35.75 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said Silas G. Whitcomb that she had paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said Silas G. Whitecomb paid the same in the sum of \$35.75; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said Silas G. Whitcomb and did promise to pay said sum to him; that although demand has been made upon said alleged bankrupt for the [51] payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said Ida Swenson purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the ap-

purtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of Thirty-nine (\$39.00) Dollars; that the alleged bankrupt collected from the said Ida Swenson the sum of \$39.00 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said Ida Swenson that she had paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said Ida Swenson paid the same in the sum of \$39.00; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said Ida Swenson and did promise to pay said sum to her; that although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said Virginia Magale Coshott purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of One Hundred Sixty-nine (\$169.00) Dollars; that the alleged bankrupt collected from the said Virginia Magale

Coshott the sum of One Hundred Sixty-nine (\$169.00) Dollars for the purpose [52] of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said Virginia Magale Coshott that she had paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said Virginia Magale Coshott paid the same in the sum of \$169.00; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said Virginia Magale Coshott and did promise to pay said sum to her; that although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said John Frear purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of One Hundred (\$100.00) Dollars; that the alleged bankrupt collected from the said John Frear the sum of \$100.00 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter repre-

sented to the said John Frear that she had paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said John Frear paid the same in the sum of \$100.00; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said John Frear and did promise to pay said sum to him; that although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and [53] that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said Josie C. Ide purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of Thirteen (\$13.00) Dollars; that the alleged bankrupt collected from the said Josie C. Ide the sum of \$13.00 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said Josie C. Ide that she had paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said Josie C. Ide paid the

same in the sum of \$13.00; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said Josie C. Ide and did promise to pay said sum to her; that although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said Mrs. A. Von Segerlund purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, New Mexico: that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of Forty (\$40.00) Dollars; that the alleged bankrupt collected from the said Mrs. A. Von Segerlund the sum of \$40.00 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said Mrs. A. Von Segerlund that she had paid said taxes, whereas in truth and in fact said taxes were [54] not so paid and remained delinquent; that to save the said real property from being sold to the State of New Mexico for taxes the said Mrs. A. Von Segerlund paid the same in the sum of \$40.00; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said Mrs. A. Von Segerlund and did promise to pay said sum to her; that

although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said H. A. Kulha purchased from the alleged bankrupt an interest in certain real property and lands in McKinley County, New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of Seven and 50/100 (\$7.50) Dollars; that the alleged bankrupt collected from the said H. A. Kulha the sum of \$7.50 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said H. A. Kulha that she had paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said H. A. Kulha paid the same in the sum of \$7.50; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said H. A. Kulha and did promise to pay said sum to him; that although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said Alma Swenson purchased from the alleged [55] bankrupt an interest in certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of Sixty-five (\$65.00) Dollars; that the alleged bankrupt collected from the said Alma Swenson the sum of \$65.00 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said Alma Swenson that she has paid said taxes, whereas in truth and in fact said taxes were not so paid and remained delinquent; that to save the said real property from being sold to the State of New Mexico for taxes the said Alma Swenson paid the same in the sum of \$65.00; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said Alma Swenson and did promise to pay said sum to her; that although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

That the said Ambrosia Investors' Company, Inc., a corporation organized and existing under the laws of the State of New Mexico and duly licensed to do business within the State of California, purchased from the alleged bankrupt an interest in

certain real property and lands in McKinley County, State of New Mexico; that the taxes on said property and the appurtenances thereon became delinquent in that there was due, owing and unpaid to the State of New Mexico therefor the sum of One Hundred Eight-four and 02/100 (\$184.02) Dollars; that the alleged bankrupt collected from the said Ambrosia Investors' Company, Inc. the sum of \$184.02 for the purpose of paying the aforesaid taxes and that the said alleged bankrupt thereafter represented to the said Ambrosia Investors' Company, Inc. that she had paid said taxes, whereas in [56] truth and in fact said taxes were not so paid and remained delinquent; that to save said real property from being sold to the State of New Mexico for taxes the said Ambrosia Investors' Company, Inc. paid the same in the sum of \$184.02; that thereafter and in or about the month of November, 1939, the said alleged bankrupt agreed with the said Ambrosia Investors' Company, Inc. and did promise to pay said sum to it; that although demand has been made upon said alleged bankrupt for the payment of said sum she has failed and refused, and still fails and refuses to pay the same, or any part thereof, and that the whole thereof is now due, owing and unpaid from said alleged bankrupt to your petitioner herein.

V.

That on the 5th day of July, 1941, Hugo Von Segerlund, Alice Von Segerlund, Florence Kee

Brown, John A. Frear, John S. Cross and Valeria C. Painter filed, in the office of the Clerk of this Court a petition praying that the said Stella Dysart, individually, and Stella Dysart doing business as Ambrosia Club and Mutual Land Owners, Limited, be adjudged an involuntary bankrupt, which petition is still pending.

VI.

That your petitioners as creditors desire to join in the proceedings herein and allege as follows:

That at all times herein mentioned and during the months of February, March, April, May and June, all of 1941, and during all of said times, the said Stella Dysart was insolvent; that while so insolvent the said Stella Dysart did permit a creditor, to-wit, Mary T. Christensen, to obtain a preference by legal proceedings in this, that Mary T. Christensen was a judgment creditor on the 7th, 8th, 9th days of June, 1941, and during all of the month of June, 1941, to and including the 7th day of July, 1941, that said Mary T. Christensen was a creditor of said Stella [57] Dysart having her indebtedness fixed as to nature, extent and amount, to-wit, a judgment had been duly made, given and rendered in favor of Mary T. Christensen as a plaintiff and against Stella Dysart as a defendant, in the District Court of the State of New Mexico, for the County of McKinley, said judgment being in the sum of approximately Twelve Hundred Eighty-three and 83/100 (\$1283.83) Dollars; that on the

9th day of June, 1941 said Mary T. Christensen, a creditor, did procure and obtain a Writ of Execution upon the judgment aforesaid and placed the same in the hands of the Sheriff of McKinley County, State of New Mexico, and did cause the said Sheriff to levy and the Sheriff did levy upon property of the defendant Stella Dysart, did set the same for sale under said Writ of Execution for the 7th day of July, 1941 and on the 7th day of July, 1941 the said Sheriff of McKinley County, State of New Mexico, did sell to the highest and best bidder, who was a person other than the said Stella Dysart, the said property of Stella Dysart in payment and in satisfaction of the said judgment in favor of Mary T. Christensen; that Stella Dysart did not within five (5) days prior to said sale vacate or cause to be vacated or discharged, and there was not discharged the lien of the levy of said Writ of Attachment and said property was sold on the date noticed, July 7th, 1941.

VII.

And for separate and second act of bankruptcy your petitioners, and each of them, allege that within four (4) months last past said Stella Dysart permitted a creditor, Mary T. Christensen, to obtain a preference by legal proceedings and said Mary T. Christensen, a creditor, did obtain a preference by legal proceedings in this, that on the 7th day of July, 1941, and while and at a time

that Stella Dysart was insolvent and was known to be insolvent by both Stella Dysart and Mary T. Christensen, and each of them, Stella Dysart permitted Mary T. Christensen to have, take [58] and dispose of certain personal property consisting of pipe and oil well equipment situate in McKinley County, State of New Mexico, to apply upon the indebtedness then, on July 7th, 1941, due from Stella Dysart to Mary T. Christensen, and Mary T. Christensen was then and there, on July 7th, 1941 a creditor, and then and there Mary T. Christensen took and obtained property of Stella Dysart to the value in excess of One Thousand (\$1,000.00) Dollars, with the permission of said Stella Dysart, and then and there obtained a greater proportion of payment of her, Mary T. Christensen's, claim than did you petitioners; that then and there Mary T. Christensen obtained the sum in excess of One Thousand (\$1,000.00) Dollars, and that your petitioners have received no payments on their respective accounts and indebtednesses at all during four (4) months immediately preceding the filing of this petition; that said Mary T. Christensen on July 7th, 1941 had reason to believe and did know that said Stella Dysart was insolvent; that said Stella Dysart was on July 14th, 1941 insolvent, that the said conveyance and taking of the said personal property by Mary T. Christensen was done with the intent on the part of Stella Dysart to permit Mary T. Christensen to obtain a preference, and said Mary T. Christen-

sen did obtain a preference over and above your petitioners and each of them.

Wherefore, your intervening petitioners respectfully pray that they may be permitted to file this their intervening petition; that Stella Dysart be adjudicated a bankrupt within the purview of the Bankruptcy Acts and the amendments thereof, as provided by the United States Bankruptcy Law and the Acts of Congress relating thereto; and that your petitioners be allowed to join in the petition of Hugo Von Segerlund, Alice Von Segerlund, Florence Kee Brown, John A. Frear, John S. Cross and Valeria C. Painter, to-wit, the petition heretofore filed, and the Court make an Order permitting [59] the intervention and the allowance of the filing of this petition, and make its Order with appropriate provisions for the service of the process in respect to this intervention petition.

W. H. BORTON
HENRIETTA BERNITT
FLORENCE KEE BROWN
SILAS G. WHITCOMB
IDA SWENSON
VIRGINIA MAGALE
COSHOTT
JOHN FREAR
W. H. BORTON,
Attorney in Fact for Josie C.
Ide
MRS. A. VON SEGERLUND
H. A. KULHA
ALMA SWENSON

AMBROSIA INVESTORS'
COMPANY, INC., A New
Mexico CorporationBy W. A. NELSON,
Vice-President.

RUPERT B. TURNBULL

L. H. PHILLIPS

Attorneys for Petitioning
Intervening Creditors.
(Duly verified.)

[Endorsed]: Filed Oct. 17, 1941. [60]

[Title of District Court and Cause.]

ANSWER OF STELLA DYSART, ET AL., TO
INVOLUNTARY PETITION BY SIX
CREDIORS.

Comes now Stella Dysart, individually and on behalf of Ambrosia Club, hereinafter referred to as Club, and also Mutual Land Owners, Ltd., a co-partnership, hereinafter referred to as Ltd. co-partnership, the above named alleged bankrupt, and answering the Involuntary Petition by Six Creditors in bankruptcy heretofore filed against said alleged bankrupt by Hugo Von Segerlund and others, hereinafter referred to as petition, admits, denies and alleges as follows to-wit:

I.

Denies generally and specifically each and every allegation contained in paragraph II of said peti-

tion except that said alleged bankrupt admits that she is an individual, and that she has resided in the City of Los Angeles, County of Los Angeles, State of California the greater portion of six months preceding the filing of said petition.

II.

Denies generally and specifically each and every allegation contained in paragraphs III and IV of said petition. [67]

III.

Denies generally and specifically each and every allegation contained in paragraph V to page 3 line 1 thereof.

Denies generally and specifically each and every allegation contained in said paragraph V commencing on page 3 line 2 to line 15 thereof except that the sum of \$500.00 was paid to and received by January 26, 1939 on account of said Ltd., co-partnership and that said Florence Kee Brown now retains her interest in the sum of \$500.00 in said Ltd. co-partnership.

Denies generally and specifically each and every allegation contained in said paragraph V commencing on page 3 line 16 through line 29 thereof.

Denies generally and specifically each and every allegation contained in said paragraph V commencing on page 3 line 30 through page 4 line 9 thereof except that the sum of \$250.00 was received by February 6, 1939 as the sale price of said land and that deed thereto was issued or will be caused to be issued to said John S. Cross and delivered to him.

Denies generally and specifically each and every allegation contained in said paragraph V commencing on page 4 line 10 through line 22 thereof except that the sum of \$125.00 was received by February 6, 1939 as the sale price of said land and that deed thereto was issued or will be caused to be issued to said Valeria C. Painter and delivered to her.

Further answering the allegations of paragraph V of said petition in addition to the other denials and allegations herein made said alleged bankrupt alleges that the alleged claims of said petitioners Hugo Von Segerlund, Alice Von Segerlund, Florence Kee Brown, John A. Frear, John S. Cross and Valeria C. Painter set forth therein, if any, each is and all are barred by the provisions of Section 339, Subdivision 1 of the Code of Civil Procedure of the State of California and in this respect and by way of further [68] answer to said claims, if any, said alleged bankrupt alleges that each and all said claims of said creditors, if any, are not fixed as to liability and liquidated as to amount as is required by the provisions of the acts of Congress relating to bankruptcy.

IV.

Answering the allegations of paragraph VI of said petition said alleged bankrupt admits the entering of the judgments alleged in said paragraph but denies that said judgments ever became a lien upon any property of said alleged bankrupt or that said alleged bankrupt was insolvent at the time al-

leged in said involuntary petition or at any other time and other than the admission herein contained denies generally and specifically each and every other allegations contained in said paragraph.

Wherefore, said alleged bankrupt prays:

1. That said petitioners take nothing by their said petition, together with
2. That said alleged bankrupt be hence dismissed, together with
3. That a judgment be entered herein denying an adjudication, together with
4. That said alleged petitioners and creditors in said involuntary petition be taxed with costs incurred by said alleged bankrupt, together with
5. Such additional and other relief as may appear just.

Dated: July 16, 1942.

STELLA DYSART,

Alleged Bankrupt on behalf of Herself and Ambrosia Club and Mutual Land Owners, Ltd., a co-partnership.

S. BERNARD WAGER,

Attorney for Alleged Bankrupt. [69]

State of California,
County of Los Angeles—ss.

Stella Dysart, on behalf of herself and Ambrosia Club and also Mutual Land Owners, Ltd., a co-partnership, being by me first duly sworn deposes and says: That she is the Alleged Bankrupt in the above entitled matter, that she has read the forego-

ing Answer of Stella Dysart, et al., to Involuntary Petition by Six Creditors and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that she believes it to be true.

STELLA DYSART.

Subscribed and sworn to before me this 16 day of July, 1942.

[Seal]

S. BERNARD WAGER,

Notary Public in and for said
County and State.

Received copy of the within Answer of Stella Dysart etc. this 17 day of July, 1942.

RUPERT B. TURNBULL and
LEWIS H. PHILLIPS,
By L. H. PHILLIPS,
Attorneys for Pet. Creditors.

[Endorsed]: Filed Jul 20, 1942. [70]

[Title of District Court and Cause.]

ANSWER OF STELLA DYSART, et al., TO PETITION OF CREDITORS TO INTERVENE AND SUPPLEMENTAL INVOLUNTARY PETITION BY CREDITORS WILLIAM PIETSCH, et al.

Comes now Stella Dysart, individually and on behalf of Ambrosia Club, hereinafter referred to

as Club, and also Mutual Land Owners, Ltd., a co-partnership, hereinafter referred to as Ltd. co-partnership, the above named alleged bankrupt and answering the said petition of creditors to intervene and supplemental involuntary petition by creditors in bankruptcy heretofore filed against said alleged bankrupt by William Pietsch and others, hereinafter referred to as petition, admits, denies and alleges as follows to-wit:

I.

Denies generally and specifically each and every allegation contained in paragraph I of said petition commencing with page 1 line 31 through page 2 line 4 thereof.

II.

Denies generally and specifically each and every allegation contained in paragraph II of said petition except that said alleged bankrupt admits that she is an individual, that she has resided in the City of Los Angeles, County of Los Angeles, State of [71] California the greater portion of six months preceding the filing of said petition.

III.

Denies generally and specifically each and every allegation contained in paragraph III of said petition.

IV.

Denies generally and specifically each and every allegation contained in paragraph IV of said pe-

tition commencing with page 2 line 27 through page 17 line 24 thereof except as follows:

Admits that the sum of \$1000.00 was paid to and received by January 1, 1939 on account of said Ltd. co-partnership and on account of the sale price of land in New Mexico and that said William Pietsch now retains his interest in the sum of \$500.00 in said Ltd. co-partnership and that deed to said land was issued to said William Pietsch and delivered to him.

Admits that the sum of \$500.00 was paid to and received by March 15, 1938 on account of said Ltd. co-partnership and that said D. F. Hanley now retains his interest in said sum in said Ltd. co-partnership.

Admits that the sum of \$402.00 was paid to and received by April 15, 1938 on account of said Ltd. co-partnership and recording fee thereof and that said Bertha Nelson now retains her interest in the sum of \$400.00 in said Ltd. co-partnership.

Admits that the sum of \$477.00 was paid to and received, \$377.00 thereof by June 30, 1939 and \$100.00 thereof by September 15, 1939 \$352.00 thereof on account of said Ltd. co-partnership and expenses thereof and that said Alma C. Swenson now retains her interest in the sum of \$350.00 in said Ltd. co-partnership and the balance \$125.00 was contributed to the defense fund.

Admits that the sum of \$265.00 was paid to and received by February 6, 1940 on account of the sale price \$175.00 of said land and contributions

towards incorporating expenses of said Ltd. co-partnership and to the defense fund of said alleged bankrupt and [72] that said Frederick R. Cook now retains his interest in the sum of \$50.00 in said Ltd. co-partnership and that deed to said land was issued or will be caused to be issued to said Frederick R. Cook and delivered to him.

Admits that the sum of \$490.00 was paid to and received by November 1, 1939 on account said Ltd. co-partnership in the sum of \$250.00 and on account of the sale price \$200.00 of said land and contribution \$40.00 to the defense fund of said alleged bankrupt and that said Josephine Kaiser now retains her interest in the sum of \$250.00 in said Ltd. co-partnership and that deed to said land was not issued by reason of court restraining order and that when permitted to said deed will be caused to be issued to her.

Admits that the sum of \$215.00 was paid to and received by January 23, 1939 on account \$125.00 in said Ltd. co-partnership and incorporating expenses thereof and \$190.00 the sale price of said land and that said Beatrice Rummelle now retains her interest \$100.00 in said Ltd. co-partnership and that upon completion of payment of balance due on the sale price of said land that if court permits deed thereto will be caused to be issued to said Beatrice Rummelle and delivered to her.

Admits that the sum of \$100.00 was paid to and received by March 28, 1938 on account of said Ltd. co-partnership and that said John J. McFarlane

now retains his interest in said sum in said Ltd. co-partnership.

Admits that the sum of \$80.00 was paid to and received by December 23, 1938 on account \$100.00 of the sale price of said land and that on completion of payment of balance due on said sale price of said land that if court permits deed thereto will be caused to be issued to said Ada Mackey and James F. Mackey Jr. and delivered to them.

Admits that the sum of \$127.00 was paid to and received [73] by January 11, 1939 on account of the sale price of said land and that deed thereto has been issued and is now in the possession of the District Attorney of Los Angeles County for the account of said Amy Simpson.

Admits that the sum of \$100.00 was paid to and received by August 13, 1938 on account of said Ltd. co-partnership and incorporating expense thereof and that said Adelaide G. Sturgis now retains her interest in said sum in said Ltd. co-partnership.

Admits that the sum of \$100.00 was paid to and received by March 15, 1938 on account of said Ltd. co-partnership and that said Margaret Bell Fitzpatrick now retains her interest in said sum in said Ltd. co-partnership.

Admits that the sum of \$102.00 was paid to and received by September 1, 1938 on account \$100.00 of said Ltd. co-partnership and \$2.00 recording fee and that said Mabel P. Travis now retains her interest in the sum \$100.00 in said Ltd. co-partnership.

Admits that the sum of \$127.00 was paid to and received by September 7, 1938 on account of sale price \$125.00 of New Mexico land and recording fee and that deed to said Eliza J. Fulton was recorded on December 7, 1938.

Admits that the sum of \$225.00 was paid to and received by September 19, 1938 \$200.00 thereof on account of said Ltd. co-partnership and \$25.00 defense fund and that said Margaret Minnick now retains her interest in the sum of \$200.00 in said Ltd. co-partnership.

Admits that the sum of \$26.00 was paid to and received by June 20, 1939 \$25.00 thereof on account of Mutual Land Owners, Inc. incorporating expenses thereof and \$1.00 tax fund and that said Nellie Nelson Lee now retains her \$25.00 in said proposed corporation.

Admits that the sum of \$152.00 was paid to and received by June 3, 1938 on account of said Ltd. co-partnership and incor- [74] porating expenses thereof and that said Ida Swenson now retains her \$150.00 interest in said Ltd. co-partnership.

Admits that the sum of \$15.00 was paid to and received by December 9, 1938 on account \$50.00 of Mutual Land Owners, Inc. and incorporating expenses thereof and that said Bertha Kenniston now retains her interest in the sum of \$15.00 in said proposed corporation.

Admits that the sum of \$12.50 was paid to and received by December 9, 1938 on account of said Mutual Land Owners, Inc. incorporating expense

thereof and that said S. H. Kenniston now retains his interest in the sum of \$12.50 in said proposed corporation.

Admits that the sum of \$102.00 was paid to and received by March 18, 1938 on account \$100.00 of said Ltd. co-partnership and recording fees thereon and that said Caroline A. Wilde now retains her interest in the sum of \$100.00 in said Ltd. co-partnership.

Admits that the sum of \$100.00 was paid to and received by October 31, 1938 on account of said Ltd. co-partnership and that said Mrs. August Dresch now retains her interest in the sum of \$100.00 in said Ltd. co-partnership.

Admits that the sum of \$54.50 was paid to and received by July 1, 1939 on account \$102.00 of said Ltd. co-partnership and recording fee thereof and \$1.00 for taxes on land owned by said Henry A. Kula and Leonia E. Kula and that said Henry A. Kula and Leonia E. Kula now retain their interest in the sum of \$53.50 in said Ltd. co-partnership.

Admits that the sum of \$42.00 was paid to and received by May 28, 1937 on account of the sale price \$40.00 and deed recording fee \$2.00 of said land and that deed thereto to Albert G. Loellke was recorded on May 28, 1937.

Admits that the sum of \$132.00 was paid to and received [75] by February 24, 1939 on account of the sale price \$250.00 of two parcels of said land and deed recording fee on one said parcel \$2.00, and that deed to one said parcel was issued to Reinholdt

A. Wolter and Adeline R. Wolter and is now in the possession of the District Attorney of Los Angeles County for the account of said Reinholdt A. Wolter and Adeline R. Wolter, husband and wife and that on completion of payment of balance due on said other parcel that if court permits deed thereto will be caused to be issued to said Reinholdt A. Wolter and Adeline R. Wolter.

Admits that the sum of \$80.00 was paid to and received by August 22, 1939 on account of and as a contribution by Silas Whitcomb towards the defense and office fund of said alleged bankrupt.

Further answering the allegations of paragraph IV of said petition of creditors in addition to the other denials and allegations herein made said alleged bankrupt alleges that the alleged claims of said petitioners William Pietsch, et al., if any, each is and all are barred by the provisions of Section 339, Subdivision 1 of the Code of Civil Procedure of the State of California and in this respect and by way of further answer to said claims, if any, said alleged bankrupt alleges that each and all said claims of said creditors, if any, are not fixed as to liability and liquidated as to amount as is required by the provisions of the acts of Congress relating to bankruptcy.

V.

Answering the allegations of paragraph VI and VII of said petition said alleged bankrupt admits the entering of the judgment alleged in said paragraphs but denies that said judgment ever became a lien upon any property of said alleged bankrupt

or that said alleged bankrupt was insolvent at the time alleged in said petition or at any other time and other than the admission herein contained denies generally and specifically each and every other allegations [76] contained in said paragraphs.

Wherefore, said alleged bankrupt prays:

1. That said petitioners take nothing by their said petition, together with
2. That said alleged bankrupt be hence dismissed, together with
3. That a judgment be entered herein denying an adjudication, together with
4. That said alleged petitioners and creditors in said petition be taxed with costs incurred by said alleged bankrupt. together with
5. Such additional and other relief as may appear just.

Dated: July 16, 1942.

STELLA DYSART

Alleged Bankrupt on behalf
of Herself and Ambrosia
Club and Mutual Land
Owners, Ltd., a co-partner-
ship

S. BERNARD WAGER

Attorney for Alleged Bank-
rupt

State of California,
County of Los Angeles—ss.

Stella Dysart, on behalf of herself and Ambrosia Club and also Mutual Land Owners, Ltd., a co-

partnership, being by me first duly sworn deposes and says: That she is the Alleged Bankrupt in the above entitled matter, that she has read the foregoing Answer of Stella Dysart, et al., to Petition of Creditors to Intervene and Supplemental Involuntary Petition by Creditors William Pietsch, et al., and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that she believes it to be true. [77]

STELLA DYSART

Subscribed and sworn to before me this 16th day of July, 1942.

[Seal] **S. BERNARD WAGER**

Notary Public in and for said County and State.

Received copy of the within answer of Stella Dysart etc. this 17 day of July 1942.

RUPERT B. TURNBULL and

L. H. PHILLIPS

By **L. H. PHILLIPS,**

Attorneys for Pet. Creditors.

[Endorsed]: Filed Jul. 20, 1942. [78]

[Title of District Court and Cause.]

ANSWER OF STELLA DYSART, ET AL., TO
PETITION OF CREDITORS TO INTER-
VENE AND SUPPLEMENTAL INVOLUN-
TARY PETITION BY CREDITORS W. H.
BORTON, ET AL.

Comes now Stella Dysart, individually and on behalf of Ambrosia Club and also Mutual Land Owners, Ltd., a co-partnership, the above named bankrupt and answering the said petition of creditors to intervene and supplemental involuntary petition by creditors in bankruptcy heretofore filed against said alleged bankrupt by W. H. Borton and others, hereinafter referred to as petition, admits, denies and alleges as follows to-wit:

I.

Denies generally and specifically each and every allegation contained in paragraph I of said petition commencing with page 1 line 23 through line 27 thereof.

II.

Denies generally and specifically each and every allegation contained in paragraph II of said petition except that said alleged bankrupt admits that she is an individual, that she has resided in the City of Los Angeles, County of Los Angeles, State of California the greater portion of six months preceding the filing of said petition. [79]

III.

Denies generally and specifically each and every

allegation contained in paragraph III of said petition.

IV.

Denies generally and specifically each and every allegation contained in said paragraph IV of said petition commencing with page 2 line 18 through page 10 line 12 thereof except as follows:

Admits that said W. H. Borton, Henrietta Ber-
nit, Florence Kee Brown, Silas G. Whitcomb, Ida
Swenson, Virginia Magale Coshot, John Frear,
Josie C. Ide, Mrs. A. Von Segerlund, H. A. Kula
and Alma Swenson purchased said land more than
two years last past prior to the filing of the invol-
untary petition herein.

Denies that said Ambrosia Investors Company,
Inc. purchased said land or any other land from
said alleged bankrupt.

Further answering the allegations of paragraph
IV of said petition in addition to the other denials
and allegations herein made said alleged bankrupt
alleges that the alleged claims of said petitioners
W. H. Borton, et al., if any, each is and all are
barred by the provisions of Section 339, Subdivision
1 of the Code of Civil Procedure of the State of
California and in this respect and by way of fur-
ther answer to said claims, if any, said alleged
bankrupt alleges that each and all said claims of
said creditors, if any, are not fixed as to liability
and liquidated as to amount as is required by the
provisions of the acts of Congress relating to bank-
ruptcy.

V.

Answering the allegations of paragraph VI and VII of said petition said alleged bankrupt admits the entering of the judgment alleged in said paragraphs but denies that said judgment ever became a lien upon any property of said alleged bankrupt or that said alleged bankrupt was insolvent at the time alleged in said petition [80] or at any other time and other than the admission herein contained denies generally and specifically each and every other allegation contained in said paragraphs.

Wherefore, said alleged bankrupt prays:

1. That said petitioners take nothing by their said petition, together with
2. That said alleged bankrupt be hence dismissed, together with
3. That a judgment be entered herein denying an adjudication, together with
4. That said alleged petitioners and creditors in said petition be taxed with costs incurred by said alleged bankrupt, together with
5. Such additional and other relief as may appear just.

Dated: July 16, 1942.

STELLA DYSART

Alleged Bankrupt on behalf
of Herself and Ambrosia
Club and Mutual Land
Owners, Ltd., a co-partner-
ship.

S. BERNARD WAGER

Attorney for Alleged Bank-
rupt. [81]

State of California,
County of Los Angeles—ss.

Stella Dysart, on behalf of herself and Ambrosia Club and also Mutual Land Owners, Ltd., a co-partnership, being by me first duly sworn deposes and says: That she is the Alleged Bankrupt in the above entitled matter, that she has read the foregoing Answer of Stella Dysart, et al., to Petition of Creditors to Intervene and Supplemental Involuntary Petition by Creditors W. H. Borton, et al., and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that she believes it to be true.

STELLA DYSART

Subscribed and sworn to before me this 16th day of July, 1942.

[Seal] **S. BERNARD WAGER**
Notary Public in and for said County and State.

Received copy of the within Answer of Stella Dysart etc. this 17 day of July, 1942.

RUPERT B. TURNBULL and
L. H. PHILLIPS
By **L. H. PHILLIPS,**
Attorneys for Pet. Creditors.

[Endorsed]: Filed Jul. 20, 1942. [82]

[Title of District Court and Cause.]

BILL OF PARTICULARS TO MAKE
MORE CERTAIN

Come Now the original petitioning creditors herein and the first intervening creditors filing supplementary involuntary petition, and complying with the suggestion and order of the Honorable Judge Dawkins, sitting herein at the time of the making of the order sustaining alleged bankrupt's motion to make more certain, files this their Bill of Particulars to make more certain, and the information required is hereby supplied as follows:

Petitioner Florence Kee Brown delivered Five Hundred (\$500.00) Dollars to the bankrupt, \$150.00 on the 15th day of January, 1938, \$100.00 on the 4th day of March, 1938, \$250.00 on the 15th day of March, 1938, \$10.00 on the 5th day of January, 1939, \$15.00 on the 26th day of January 1939, and \$25.00 on the 1st day of October, 1938, under the conditions set forth in paragraph V page 3 of the Creditors' Petition.

Petitioner John S. Cross delivered Two Hundred and Fifty (\$250.00) to the alleged bankrupt on the 27th day of February, 1939.

Petitioner Valeria C. Painter delivered One Hundred Twenty-five (\$125.00) Dollars to the alleged bankrupt on the 4th day of February, 1939.

Intervening creditor William Pietsch delivered One Thousand (\$1,000.00) Dollars to the alleged bankrupt on the 27th day of February, 1939.

Petitioner John J. McFarlane delivered One Hundred [83] (\$100.00) to the alleged bankrupt on the 27th day of February, 1939.

Petitioner Bertha Kenniston delivered Thirty (\$30.00) Dollars to the alleged bankrupt on the 27th day of February, 1939.

Petitioner S. H. Kenniston delivered Twelve Dollars Fifty Cents (\$12.50) to the alleged bankrupt on the 27th day of February, 1939.

Petitioner Caroline A. Wilde delivered One Hundred Two (\$102.00) Dollars to the alleged bankrupt on the 14th day of June, 1939.

That the aforesaid petitioners and each of them discovered on or about the 1st day of January 1940, the bankrupt had not given them anything of value and did not intend to convey to them anything of value; that the bankrupt had not created under the laws of the State of Utah, any limited or other partnership, nor any entity under the name of Mutual Land Owners, Limited, or under any name whatsoever, and had filed no certificate as required by the laws of the State of Utah or any portion thereof or any political subdivision thereof; that the bankrupt had heretofore represented and stated to the petitioners that she would create the Mutual Land Owners, Limited, a limited partnership under the laws of the State of Utah; that said representations were made immediately prior to and at the times the aforesaid moneys were paid by the said respective petitioners to the bankrupt; that the said alleged bankrupt at said times represented and

stated to said petitioners and each of them, that said organization known as Mutual Land Owners, Limited, would be completed immediately succeeding the dates of the receipt of said moneys; that your petitioners and each of them relied upon said promises and paid the moneys aforesaid, believing said statements to be true.

That said statements made by said bankrupt are untrue and said statements and promises were made without any intention on [84] the part of the said bankrupt to fulfill them or any portion thereof, and said statements were made as a part and a portion of a general plan and scheme to defraud a group of persons, approximately three hundred (300) in number, approximately two hundred and twenty-five (225) of whom reside and make their home in the County of Los Angeles, State of California, including the petitioners.

That said bankrupt did not perform any act so promised by her to be done and performed, did not form said partnership, limited or otherwise, did not file any certificate of partnership with the County Recorder of Salt Lake County, State of Utah, in any manner or at all.

That at the time of obtaining said moneys from said petitioners and each of them, the said bankrupt stated to the said petitioners and each of them, that she would so file a certificate of the Mutual Land Owners, Limited, in the office of the County Recorder of Salt Lake County, State of Utah.

That your petitioners and each of them did not

discover until January 1st, 1940, the said promises were untrue, and were unfulfilled, and that the said statements had been made without any intention on the part of the said bankrupt to fulfill them, and that said acts promised by the said bankrupt would not be performed.

That said petitioners and each of them did not discover until January 4, 1940 the said fraud perpetrated upon them.

Petitioners allege that there was no consideration for the payments made by them and each of them respectively to the said alleged bankrupt, and that on the 4th day of January, 1940 on discovering said fraud, they and each of them elected to recover the moneys so paid without consideration to the bankrupt.

RUPERT B. TURNBULL and

L. H. PHILLIPS

By L. H. PHILLIPS

Attorneys for petitioning &
intervening creditors

[Endorsed]: Filed Oct. 17, 1941. [85]

PETITIONING CREDITORS' EXHIBIT No. 1
FOR IDENTIFICATION

11/4/42

CERTIFICATE

State of New Mexico
County of McKinley—ss.

I, Eva Ellen Sabin, Clerk of the District Court in and for said County, do hereby certify that I have compared the papers in writing, to which this certificate is attached, with the original Judgment, Executions and Sheriff's Returns as the same appear of record and on file in my said office, at the court house, in said County, and that the same are true and correct copies of said original Judgment, Executions and Sheriff's Returns, and the whole thereof.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Gallup, McKinley County, New Mexico, this 22nd day of October, 1942.

EVA ELLEN SABIN
Clerk
By B. MARTINEZ
Deputy

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

CERTIFICATE

State of New Mexico

County of Bernalillo—ss.

I, Albert R. Kool, Judge of the Second Judicial District of the State of New Mexico, do hereby certify that Eva Ellen Sabin whose name is subscribed to the foregoing certificate of attestation, now is, and was, at the time of signing and sealing the same, Clerk of the District Court of McKinley County aforesaid, which County is in the First Judicial District, and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are and of right ought to be given to all her official acts as such in all Courts of record and elsewhere; and that her said attestation is in due form, and by the proper officer.

Given under my hand and seal this 26 day of October, 1940, at Albuquerque, Bernalillo County, New Mexico.

ALBERT R. KOOL

District Judge of the Second
Judicial District, sitting in
place and stead of Honorable
David Chavez, Jr., Dis-
trict Judge. [86]

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

CERTIFICATE

State of New Mexico
County of McKinley—ss.

I, Eva Ellen Sabin, Clerk of the District Court in and for said County, in the State aforesaid, do hereby certify that Honorable Albert R. Kool, whose genuine signature is appended to the foregoing certificate, was at the time of signing the same, Judge of the Second Judicial District of the State of New Mexico, sitting for Honorable David Chavez, Jr., Judge of the First Judicial District, of which First Judicial District, the said McKinley County forms a part, duly elected and qualified; that full faith and credit are and of right ought to be given to all his official acts as such, in all Courts of record and elsewhere.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, at my office in Gallup, McKinley County, New Mexico, this 22nd day of October, 1942.

EVA ELLEN SABIN

Clerk

By B. MARTINEZ

Deputy [87]

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

In the District Court of the State of New Mexico,
First Judicial District in and for the County
of McKinley

No. 5134

MARY T. CHRISTENSEN,

Plaintiff,

v.

S. DYSART and NEW MEXICO OIL
PROPERTIES,

Defendants.

JUDGMENT

This case having come on to be tried before the court sitting without a jury at Gallup, New Mexico, on February 22nd and 23rd, 1937, and the plaintiff being present in person and by her attorney Harris K. Lyle, Esq., and the defendant S. Dysart being present in person and by her attorneys M. J. McGuinness, Esq., and M. G. Macneil, Esq., and both parties having offered such evidence oral and documentary as they desired, and the court being fully advised in the premises, finds the following facts:

1. That on April 7, 1936, the defendants herein were and had been for some months prior thereto engaged in the business of drilling oil wells in McKinley County, New Mexico.

2. That on said April 7, 1936, and for some months prior thereto, one Christian Theodore

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

Christensen had been an employee of the defendants, engaged in carpenter work, and that during all of said time the defendants had more than four regular employees.

3. That the business in which the defendants were engaged was an extra-hazardous occupation within the meaning of the New Mexico Workmen's Compensation Act, but notwithstanding such fact, the defendants had not procured a workmen's compensation policy or procured a certificate of solvency excusing them from the giving of such policy.

4. That said Christian Theodore Christensen departed this life in McKinley County, New Mexico, on April 7, 1936, at buildings being constructed by the defendants. [88]

5. That for at least six weeks prior to the death of said Christensen, which occurred on or about April 7, 1936, he had been suffering from coronary thrombosis, and had consulted a Dr. Whittaker, attached to the Civilian Conservation Corps camp at San Mateo, New Mexico, and that said doctor had informed said Christensen of his disease and advised that he should remain in bed until he had consulted a private physician.

6. That during all the time the said Christensen was in the service of the defendants, he was employed as a carpenter, and received for his labor the sum of Three and 50/100 (\$3.50) Dollars per day, working (7) seven days a week.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

7. That on the morning of April 7, 1936, the said Christensen was not feeling well and on account thereof did not go to work, but that about ten o'clock in the morning of said day, he went to a building being constructed by the defendant and was ordered by the defendant's carpenter-foreman to go to work upon said building and assist with the carpenter work thereon; that about two o'clock in the afternoon of said day, Christensen and his helper were engaged in laying ship-lap on said building for roofing, and at said time were working upon a scaffold which was at least six feet above the ground.

8. That the ship-lap which Christensen and his helper were using for roofing was stacked against said scaffolding, so that one end was touching the ground and the other resting against the scaffolding, and that as a board would be nailed in place, Christensen or his helper would reach down and pull up another board; that while so engaged in his carpenter work, Christensen slumped down, started to slide down the boards, fell, and received a severe bruise upon his head, a cut on the eye, and a cut on the lip, and said cuts were distended; that he also received two broken ribs; that the fracture of one rib was so severe that it was completely parted and it punctured the lung, causing a severe internal hemorrhage, and that shortly thereafter the said Christensen died.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

9. That Christensen did not disclose to his employer he was suffering from heart trouble. [89]

10. That said Christensen had been employed by the defendants in McKinley County, New Mexico, from the 12th day of September, 1935, until the 7th day of April, 1936, which was the date of his death, but for sixteen years prior to coming to New Mexico in the employ of the defendants the said Christensen resided and worked in and about Alhambra, California; that the increase in altitude from Alhambra, California to Ambrosia Dome in McKinley County, in New Mexico, the place where the work was carried on, put an additional load upon the respiratory and cardiac systems of the said Christensen.

11. That the nature of the work which the said Christensen was doing immediately prior to his death materially contributed to and caused him to slump down, and slip from the scaffolding where he was working, and to fall; that the wound upon the forehead to said Christensen was severe, and as shown by the autopsy made by the physicians, there was considerable hemorrhage between the skull bone and the skin, and that there was a very large amount of blood in the pleural cavity, which was the immediate result of the puncture of the lung by the broken rib, and that practically all of said hemorrhage occurred prior to the death of said Christensen, and said injuries and wounds

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

were of themselves sufficient to cause death, without regard to the heart condition, and that death was occasioned by an accident arising out of and in the course of his employment on behalf of the defendants.

12. That the plaintiff is the widow of said Christian Theodore Christensen and was dependent upon him for support at the time of his death, and that they did not have any children.

13. That the defendant has refused to pay any compensation herein and this action was instituted on April 17, 1936, after denial of liability, and that the plaintiff has employed Harris K. Lyle, an attorney of Gallup, New Mexico, as her attorney, and he is representing her in these proceedings, and a reasonable fee for his services is the sum of Five Hundred (\$500.00) Dollars.

And the court concludes as a matter of law that the plaintiff is entitled to recover upon her complaint; in addition to the statutory amount allowed the widow is entitled to the sum of One Hundred and Twenty-five (\$125.00) Dollars for funeral expenses and Five hundred [90] (\$500.00) Dollars for attorney's fees to Harris K. Lyle.

Now Therefore, It Is Ordered Adjudged and Decreed, that the plaintiff Mary T. Christensen do have and recover judgment against the defendants S. Dysart and New Mexico Oil Properties or either of them compensation in the sum of Two thousand Nine hundred and Forty (\$2940.00) Dollars pay-

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

able at the rate of Nine and 80/100ths (\$9.80) Dollars per week from and after the 7th day of April, 1936, together with the further sum of One hundred and Twenty-five (\$125.00) Dollars for funeral expenses and Five hundred (\$500.00) Dollars for attorney's fees.

It Is Further Ordered Adjudged and Decreed, that compensation for forty-nine (49) weeks from April 7th, 1936 to March 16th, 1937, to-wit, the sum of Four hundred and Eighty and 20/100 (\$480.20) Dollars, together with the sum of One hundred and Twenty-five (\$125.00) Dollars allowed for funeral expenses and the sum of Five hundred (\$500.00) Dollars allowed for attorney's fees, making in all the total sum of One thousand One hundred and five and 20/100ths (\$1105.20) Dollars, is immediately due and payable, and that the further sum of Nine and 80/100ths (\$9.80) Dollars per week will be due and payable commencing on March 23rd, 1937, and on the Tuesday of each successive week thereafter until the full sum has been paid, and for the said sums which are now due and payable let execution issue.

(Signed)

JAMES B. McGHEE

District Judge of the Fifth
Judicial District, sitting for
and on behalf of the Hon.
David Chavez, Jr., District
Judge of the First Judicial
District. [91]

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

The State of New Mexico

To the Sheriff of McKinley County, Greetings:

You Are Hereby Commanded, That of the goods and chattels, lands and tenements of S. Dysart and New Mexico Oil Properties in your County, you cause to be made the sum of \$3565.00 Dollars damages, and Dollars cost of suit, which by the judgment of our District Court within and for the County of McKinley and State aforesaid, at the Feb. term thereof, A. D., 1937, Mary T. Christensen recovered against the said S. Dysart and New Mexico Oil Properties, with interest thereon from the 22nd day of March, A. D. 1937, until paid, at the rate of six per cent, per annum, and also the costs that may accrue; and due return made of your proceedings on this writ before our said District Court, within sixty days hereof, to render, etc., and have you then and there this writ.

Witness, The Hon. David Chavez, Jr., Judge of
the District Court of the First Judicial District
of the State of New Mexico, within and for the
County of McKinley and the seal of said Court
this 8th day of Sept., A. D., 1937.

[Seal] MARTIN LOPEZ
Clerk.

By _____

Deputy.

Filed Mar. 19. 1938. Martin Lopez, Clerk. [92]

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

CERTIFICATE OF SERVICE

I, Dwight Craig, Undersheriff of McKinley County, do hereby certify that I served the attached Writ of Execution on the 22nd day of September, 1937 by taking into my custody the following personal property:

All the furniture contained in one 6-room house
One electric washer
One Mangle
All the furniture contained in one bunkhouse
One 2½-ton Reo truck
One 1½-ton Chevrolet truck
One 1936 Chevrolet pick-up
One 1500-watt Kohler electric light plant
680 ft. of 8-in. casing on the ground near water well
580 ft. of 4-in. casing
4 head of cows
1320 ft. of 12½-in. casing in oil well
2 complete strings of drilling and fishing tools
One 70-horse power steam boiler
3 1000-bbl. steel tanks
1 gasoline engine
3 tents, 18' x 22'
24 single beds with mattresses
1 large radio
400 ft. of 12½-in. casing

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

150 sacks aquajell

55 joints of 2½-in. water pipe

(Signed) D. W. ROBERTS,
SheriffBy D. A. CRAIG
Udersheriff

Filed Mar. 19, 1938. Martin Lopez, Clerk. [93]

The State of New Mexico

To the Sheriff of McKinley County, Greetings:

You Are Hereby Commanded, That of the goods and chattels, lands and tenements of S. Dysart in your County, you cause to be made the sum of \$245.00 plus costs of service of this writ, advertising, and sale.....Dollars damages, and..... Dollars cost of suit, which by the judgment of our District Court within and for the County of McKinley and State aforesaid, at the Feb. term thereof, A. D., 1937, Mary T. Christensen recovered against the said S. Dysart, with interest thereon from the 15th day of July, A. D., 1939, until paid, at the rate of six per cent, per annum, and also the costs that may accrue; and due return made of your proceedings on this writ before our said District Court, within sixty days hereof, to render, etc., and have you then and there this writ.

Witness, The Hon. David Chavez, Jr., Judge of the District Court of the First Judicial District of

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

the State of New Mexico, within and for the County
of McKinley and the seal of said Court this 21st
day of November, A. D., 1939.

[Seal] EVA ELLEN SABIN

Clerk

By B. MARTINEZ

Deputy.

Filed Dec. 14, 1939. Eva Ellen Sabin, County
Clerk. [94]

CERTIFICATE OF SERVICE

State of New Mexico

County of McKinley—ss.

I, the undersigned, do hereby certify that I received the attached Writ of Execution on the 21st day of November, 1939 and that I served the same on the 13th day of December, 1939 by levying upon and taking possession of thirty-one (31) pieces of used oil well casing, 10-inch in diameter and 20-foot lengths, stacked near the well known as Dysart No. 2, located on Section 14, Township 14 North, Range 19 West, N.M.P.M. in McKinley County, New Mexico.

I further certify that I am entitled to fees for this execution for 162 miles travelled at the rate of eight cents per mile making the amount of \$12.96, and \$1.50 for the service of the writ, making in all \$14.46.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

In Witness Whereof, I have hereunto set my hand and seal this 14th day of December, 1939.

(Signed) D. W. ROBERTS
 Sheriff

(Signed) D. A. CRAIG
 Undersheriff.

Filed Dec. 14, 1939. Eva Ellen Sabin, County Clerk. [95]

The State of New Mexico
ALIAS WRIT

To the Sheriff of McKinley County, Greetings:

You Are Hereby Commanded, That of the goods and chattels, lands and tenements of Stella Dysart in your County, you cause to be made the sum of Nine hundred seventy-four and 17/100 (\$974.17) Dollars damages, and Fourteen and 46/100 (\$14.46) Dollars cost of suit, which by the judgment of our District Court within and for the County of McKinley and State aforesaid, at the March term thereof, A. D., 1937, Mary T. Christensen recovered against the said Stella Dysart with interest thereon from the day of A. D., 192 , until paid, at the rate of per cent, per annum, and also the costs that may accrue; and due return made of your proceedings on this writ before our said District Court, within sixty days hereof, to render, etc., and have you then and there this writ.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

Witness, The Hon. David Chavez, Jr., Judge of the District Court of the First Judicial District of the State of New Mexico, within and for the County of McKinley and the seal of said Court this 5th day of May, A. D., 1941.

[Seal] EVA ELLEN SABIN

Clerk

By B. MARTINEZ

Deputy

Filed June 11, 1941. Eva Ellen Sabin, County Clerk. [96]

State of New Mexico

ss

County of McKinley

I, the undersigned, do hereby certify that I am a Deputy Sheriff of McKinley County, New Mexico; that I received the within Writ of Execution on the 6th day of May, 1941; That I served the same by delivering a copy thereof to H. Eaves, caretaker for the defendant Stella Dysart, and by taking into my possession the following described personal property;

1. One locomotive type boiler 55 H. P. with trimmings make oil well supply.
2. One boiler feed pump.
3. One ideal Ajax steam drilling engine, 12 x 12 with flywheel.
4. Pully and Balance rims.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

5. One Ply national steam Turbine Generator.
6. One complete Standard rig well 6' rig irons together with 85" derrick engine house.
7. Belt house and derrick house rig made by Union Tool Company.
8. One Crown Block, complete with sheaves. One three sheaves traveling block.
9. One 6" swivel hook spring type. One inch calf line.
10. One temper screw with rope clamps.
11. One oil forge.
12. One Star Steam blower.
13. One Swivel Wrench.
14. Two derrick cranes.
15. One No. 2 Bartlett Cycle Jack.
16. Two 5 1/2" Tool Wrenches.
17. Two Wire line sockets, 2 3/4 x 3 3/4 joints.
18. One substitute 3 x 4 pin, 2 3/4 x 3 3/4 box.
19. One substitute 2 3/4 x 3 3/4 pin, 4x5 box.
20. One latch jack for eight inch hole with 2 3/4 x 3 3/4 pin.
21. One set No. 16 Vulcan chain tongs.
22. One combination socket for eight inch hole with 2 1/2 x 3 1/2 pin.
23. One 5 in. drill stem, 30 feet long jars and sinker bars connected.
24. One 14 1/2 x 25 drill stem.
25. One set fishing jars, 5 1/2 inches.
26. One substitute.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

27. One combination socket for ten inch hole.
28. One set casing tongs.
29. One dun tool brace.
30. One forgery handle.
31. Two sets five and half inch drilling jars,
 $2\frac{3}{4} \times 3\frac{3}{4}$ ---7 joints.
32. One round fuel tank. Two feet six inches by
eight feet four inches.
33. Two gasoline tanks four feet three inches
by three feet.
34. Twenty seven lengths of $8\frac{1}{4}$ casings.
35. Four short joints, $8\frac{1}{4}$ casings.
36. One eight inch bailer, 12 feet long.
37. Two five and a half inch tool wrenches.
38. One rope socket, $2\frac{1}{2} \times 3\frac{1}{2}$.
39. One swivel socket Canadian Pattern, $2\frac{1}{4}$
 $\times 3\frac{1}{4}$ joint.
40. One substitute $2\frac{1}{4} \times 3\frac{1}{4}$ pin, $2\frac{1}{2} \times 3\frac{1}{2}$
box.
41. One pair $8\frac{1}{4}$ casings clamps.
42. One water tank--wagon type.
43. Sixty length $2\frac{1}{2}$ upset tubing.
44. Eight length of two inch pipe.
45. One wooden reel of sand line.
46. One premier gear driven force pump.
47. One Fairbanks Morse steam driven mud hog
pump.
48. One three prong grab $2\frac{1}{4} \times 3\frac{1}{4}$ pin.
49. One Substitute $2\frac{1}{2} \times 3\frac{1}{2}$ pin, $2\frac{1}{4} \times$
 $3\frac{1}{4}$ box.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

50. One set ten inch casing clamps.
51. One center spear, 2 1/2 x 3 1/2 pin.
52. One center spear 2 3/4 x 3 3/4 pin.
53. Two ten inch drill bits, 3 1/4 x 4 1/4 pin.
54. Two eight inch drill bits 2 3/4 x 3 3/4 pin.
55. One six inch latch jack, 2 1/4 x 3 1/4 pin.
56. One casing spider with rig and slips for 8,
10, and 12 inch pipe.
57. One 3 1/2 inch swivel hook.
58. One substitute 2 1/2 x 3 1/2 pin, 2 1/4 x 3 1/4
box.
59. One ten inch drill bit 2 1/4 x 3 1/4 pin.
60. One substitute 2 1/2 x 3 1/2 pin, 2 3/4 x 3 3/4
Box. [97]
61. One drill stem 4 1/2 x 20 feet long, 2 1/2 x
3 1/2 box and pin.
62. One set 5 1/2 drilling jars. 2 1/2 x 3 1/2 box
and pin.
63. One Prosser socket, 2 1/2 x 3 1/2 box.
64. One 4 1/2 drill stem, 31 feet 9 inches long
with 2 3/4 x 3 3/4 pin, 3 1/4 x 4 1/4 box.
65. One dart bailer valve, 4 1/4 x 16 feet long.
66. One dart bailer 6 5/8 x 12 feet long.
67. One Auger type bailer, 3 inc. tube.
68. One Cementing bailer for 3 in. tubing.
69. One Dart valve bailer, 10 inch, 18 feet long.
70. Six lengths of ten inch forty pound weld
casing.
71. Two pieces of eight inch well casing.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

72. Two lengths of four and three fourths OD casing.
73. One Swedge nipple, 15 1/2 to 8 1/4.
74. One 2 1/2 inch tubing to tool joint substitute.
75. One swedge nipple 10 to 8.
76. One swedge nipple 2 1/2 to 10.
77. One set tuble under reamer lugs, 19 inch.
78. 2000 feet of 6 x 7 sandline.
79. One bit dressing ramp.
80. One two hundred and fifty barrel Columbian steel boltd tank.
81. One four inch drill stem, 20 feet eight inches long, 2 1/2 x 3 1/2 box and pin.
82. One eight inch control head.
83. One wall hook for 12 1/2 inch hole with 3 1/4 x 4 1/4 inch pin.
84. One pipe to tool joint substitute 3 1/4 x 4 1/4 box and pin for 8 5/8 OD casing.
85. One prosser socket 2 3/4 x 3 3/4.
86. To 15 1/2 drill bits 2 1/4 x 3 3/4 pin.
87. One 15 1/2 drill bit, 2 3/4 x 3 3/4 pin.
88. One 12 1/2 inch under reamdr.
89. One 18 inch, 3 sheaves casing block.
90. Two 8 inch drill bits 2 1/4 x 3 1/4 pin.
91. One Burns well socket, 2 1/2 x 3 1/4 pin.
92. One six inch drill bit, 2 1/2 x 3 1/2 pin.
93. One 15 1/2 inch Buiberson casing tong.
94. One 12 1/2 inch Anchor wall packer.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

95. One Bailer dart valve type 6 3/4 x 20 feet long.
96. One dart valve v bailer, 8 in. by 19 feet long.
On the 6th day of June, 1941 in McKinley County,
New Mexico.

In Witness Whereof, I have hereunto set my hand and seal this 9th day of June, 1941.

W. N. DANNER,
Deputy Sheriff. [98]

AMENDED RETURN OF EXECUTION

I, D. F. Mollica, Sheriff of McKinley County, do hereby certify that on the 6th day of June, 1941 I served a writ of execution in that certain cause entitled Mary T. Christensen, plaintiff, vs. S. Dysart and New Mexico Oil Properties, defendants and numbered 5134, which said writ of execution is hereunto affixed, and that at said time I did levy execution upon all of the well cessing in three certain wells numbered and located as follows:

Dysart No. 1 well in the Northwest Quarter of the Northeast Quarter (NW 1/4 of NE 1/4) of Section 14, Township 14 North, Range 10 West,

Ambrosia Investors Company No. 1 well in the Southeast Quarter of the Southeast Quarter (SE 1/4 of SE 1/4) of Section 11, Township 14 North, Range 10 West,

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

S. Dysart No. 1 well in the Southwest Quarter of the Southwest Quarter (SS $\frac{1}{4}$ of SW $\frac{1}{4}$) of Section 21, Township 14 North, Range 9 West,

and that through inadvertence these items were omitted from the earlier return of service made in this cause.

In Witness Whereof, I have hereunto set my hand and seal this 17 day of July, 1941.

D. F. MOLLICA,

Sheriff

By W. N. DANNER,

Deputy.

Filed Jul. 17, 1941. Eva Ellen Sabin [99]

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)In the District Court of the State of New Mexico,
First Judicial District in and for the
County of McKinley

No. 5134

MARY T. CHRISTENSEN,

Plaintiff

vs.

S. DYSART and NEW MEXICO OIL PROPE-
ERTIES,

Defendant

NOTICE OF EXECUTION SALE

Public Notice Is Hereby Given:

That the undersigned will, on the 7th day of July, 1941 at the front door of the Courthouse of McKinley County in Gallup, New Mexico at the hour of ten o'clock in the forenoon, offer for sale at public auction to the highest and best bidder for cash the following described goods and chattels:

One locomotive type boiler 55 H. P. with trimmings, make, Oil Well Supply, one boiler feed pump, one Ideal Ajax steam drilling engine, 12x12 with flywheel, pully and balance rims, one ply national steam turbine generator, one complete Standard rig well 6' rig irons together with 85" derrick engine house, belt

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

house and derrick house rig made by Union Tool Company, one Crown Block, complete with sheaves, one three sheaves traveling block, one 6" swivel hook spring type, one inch calf line, one temper screw with rope clamps, one oil forge, one Star steam blower, one swivel wrench, two derrick cranes, one No. 2 Bartlett cycle jack, two 5 1/2" tool wrenches, two wire line sockets, 2 3/4 x 3 3/4 joints, one substitute 3x4 pin, 2 3/4 x 3 3/4 box, one substitute 2 3/4 x 3 3/4 pin, 4x5 box, one latch jack for eight inch hole with 2 3/4 x 3 3/4 pin, one set No. 16 Vulcan chain tongs, one combination socket for eight inch hole with 2 1/2 x 3 1/2 pin, one 5-in. drill stem, 30 feet long jars and sinker bars connected, one 14 1/2 x 25 drill stem, one set fishing jars, 5 1/2 inches, one substitute, one combination socket for ten inch hole, one set casing tongs, one dun tool brace, one forgey handle, two sets five and half inch drilling jars, 2 3/4 x 3 3/4, 7 joints, one round fuel tank, 2'6" x 8'4", two gasoline tanks 4'3" x 3, 27 lengths of 8 1/4 casings, 4 short joints 8 1/4 casing, one 8" bailer 12' long, two 5 1/2" tool wrenches, one rope socket 2 1/2 x 3 1/2, one swivel socket Canadian pattern, 2 1/4 x 3 1/4 joint, one substitute 2 1/4 x 3 1/4 pin, 2 1/2 x 3 1/2 box, one pair 8 1/4 casing clamps, one water tank, wagon type, 60 length

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

2 1/2 upset tubing, 8 length 2-in. pipe, one wooden reel of sand line, one Premier gear driven force pump, one Fairbanks Morse steam driven mud hog pump, one three-prong grab 2 1/4 x 3 1/4 pin, one substitute 2 1/2 x 3 1/2 pin, 2 1/4 x 3 1/4 box, one set 10-in. casing clamps, one center spear, 2 1/2 x 3 1/2 pin, one center spear 2 3/4 x 3 3/4 pin, two 10-in. drill bits, 3 1/4 x 4 1/4 pin, two 8-in. drill bits 2 3/4 x 3 3/4 pin, one 6-in. latch jack 2 1/4 x 3 1/4 pin, one casing spider with rig and slips for 8, 10 and 12 inch pipe, one 3 1/2 inch swivel hook, one substitute 2 1/2 x 3 1/2 pin, 2 1/4 x 3 1/4 box, one 10-in. [100] drill bit 2 1/4 x 3 1/4 pin, one substitute 2 1/2 x 3 1/2 pin, 2 3/4 x 3 3/4 box, one drill stem 4 1/2 x 20 feet long, 2 1/2 x 3 1/2 box and pin, one set 5 1/2 drilling jars 2 1/2 x 3 1/2 box and pin, one Prosser socket 2 1/2 x 3 1/2 box, one 4 1/2 drill stem, 31 ft. 9 in. long with 2 3/4 x 3 3/4 pin, 3 1/4 x 4 1/4 box, one dart bailer valve 4 1/4 x 16 ft. long, one dart bailer valve 4 1/4 x 16 ft. long, on one dart bailer 6 5/8 x 12 ft. long, one Augur type bailer 3 in. tube, one cementing bailer for 3-in. tubing, one dart valve bailer, 10 in., 18 ft. long, 6 lengths of 10-in. 40-lb. weld casing, two pieces of 8-in. well casing, two lengths of 4 3/4 OD casing, one Swedge nipple 15 1/2 to 8 1/4, one 2 1/2-

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

in. tubing to tool joint substitute, one swedge nipple 10 to 8, one swedge nipple 2 1/2 to 10, one set tube under reamer lugs, 10-in., 2000 ft. of 6 x 7 sandline, one bit dressing ramp, one 250-bbl. Columbian steel bolted tank, one 4-in. drill stem, 20 ft. 8 in. long, 2 1/2 x 3 1/2 box and pin, one 8-in. control head, one wall hook for 12 1/2 inch hole with 3 1/4 x 4 1/4 inch pin, one pipe to tool joint substitute 3 1/4 x 4 1/4 box and pin for 8 5/8 OD casing, one prosser socket 2 3/4 x 3 3/4, two 15 1/2 drill bits 2 1/4 x 3 3/4 pin, one 15 1/2 drill bit, 2 3/4 x 3 3/4 pin, one 12 1/2 inch under reamer, one 18-in. 3 sheaves casing block, two 8-in. drill bits 2 1/4 x 3 1/4 pin, one Burns well socket, 2 1/2 x 3 1/2 pin, one 6-in. drill bit, 2 1/2 x 3 1/2 pin, one 15 1/2 in. Buiberson casting tong, one 12 1/2 in. Anchor wall packer, one bailer dart valve type 6 3/4 x 20 ft. long, one dart valve bailer, 8-in. x 19 ft. long.

The foregoing property will be sold to satisfy the balance due of a certain judgment entered on the 22nd day of March, 1937 in a suit entitled Mary T. Christensen, Plaintiff, and S. Dysart and New Mexico Oil Properties, Defendants, and numbered 5134 on the records of the District Court in and for the County of McKinley and duly recorded in Book I at page 404 of Judgment Records of said county, of which judgment there remains due and

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

unpaid the sum of One Thousand Seven Hundred and Thirty-four and 60/100 (\$1734.60) Dollars with interest to the date of the sale in the sum of Fifty-eight and 84/100 (\$58.84) Dollars and costs of execution in the further sum of Twenty-eight and 92/100 (\$28.92) Dollars and the cost of sale and publishing this notice.

All the above property will be sold as it now lies on the ground near Ambrosia Lake.

Dated this 10th day of June, 1941.

(Signed) D. F. MOLLICA,
Sheriff.

Publication:

Jun. 11, 1941

18

25

July 2

[Filed]: June 11, 1941. [101]

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

In the District Court of the State of New Mexico,
First Judicial District in and for the County
of McKinley.

No. 5134

MARY T. CHRISTENSEN,

Plaintiff,

vs.

S. DYSART and NEW MEXICO OIL PROPE-
ERTIES,

Defendants.

REPORT OF SALE

Now comes D. F. Mollica, Sheriff of McKinley
County, acting by and through D. W. Roberts,
undersheriff, and makes this his report, acts and
doings in the premises.

I.

That on the 7th day of July, 1941 at the hour
of ten o'clock A. M. at the front door of the court
house of McKinley County in Gallup, New Mex-
ico, the undersigned did offer for sale at public
auction to the highest and best bidder for cash all
of those chattels and items as specifically set out in
the Notice of Sale and filed herein.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

II.

That the aforesaid Notice of Sale was duly published in the Gallup Independent, a newspaper of general circulation in the Town of Gallup, for four successive weeks as required by law and as more particularly appears from the affidavit of A. W. Barnes duly filed in this cause.

III.

That there was more than one bid received at said sale, and that the opening bid was Two Hundred (\$200.00) Dollars and the highest and best bid was Nine Hundred and Fifty (\$950.00) Dollars made by John Ashback of Durango, Colorado, and that said sum was the highest and best bid which could be obtained under the circumstances. That the undersigned upon learning that no higher bid could be obtained, accepted the bid of the said John Ashback.

IV.

That thereafter the undersigned made and executed a bill of sale covering the aforesaid property and conveying all of the goods, wares and chattels described in the published notice of sale to the said John Ashback for the consideration of Nine Hundred and Fifty (\$950.00) Dollars, a copy of which bill of sale has been filed in the records of this cause. [102]

V.

That the undersigned received from the said John

**Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)**

Ashback the sum of \$950.00 in cash, and that out of said funds there were paid the following costs and expenses of said sale:

Levy of execution and mileage.....	\$ 28.92
Statutory commissions on holding of sale (4% on first \$500.00 and 2% on excess)	29.00
Cost of publication of notice of sale in the Gallup Independent.....	40.82

and that the balance of the funds received, to-wit, the sum of Eight Hundred and Fifty-one and 26/100 (\$851.26) Dollars, was paid over to the attorney for the plaintiff.

Wherefore, the undersigned prays that this Honorable Court shall be pleased to approve and confirm his acts and doings in the premises.

D. F. MOLLICA,
Sheriff.

By D. W. ROBERTS,
Undersheriff.

State of New Mexico,
County of McKinley—ss.

D. W. Roberts, being first duly sworn, deposes and says:

That he is the undersheriff whose name is subscribed to the foregoing Report of Sale; that he

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

has read said report and knows the contents thereof,
and the same is true of his own knowledge.

D. W. ROBERTS.

Subscribed and sworn to this 8th day of July,
1941, before me,

MARY A. LYLE,

Notary Public in and for the County of McKinley
and State of New Mexico.

My commission expires: Dec. 9, 1943. [Seal]

Filed: Jul. 8, 1941. [103]

SHERIFF'S BILL OF SALE

Know All Men By These Presents:

That I, D. F. Mollica, duly elected, qualified and acting sheriff of McKinley County, New Mexico, for and in consideration of the sum of Nine Hundred and Fifty (\$950.00) Dollars to me in hand paid by John Ashbeck of Durango, Colorado, the receipt whereof is hereby confessed and acknowledged, do hereby bargain, sell, transfer, assign and set over unto the said John Ashbeck all of the following described goods and chattels as they now are lying on the ground in the vicinity of Ambrosia Lake, McKinley County, New Mexico, to-wit:

One locomotive type boulder 55 H.P. with trimmings, make, Oil Well Supply, one boiler feed pump, One Ideal Ajax steam drilling engine, 12x12 with flywheel, pulley and balance

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

rims, one ply national steam turbine generator, one complete Standard rig well 6' rig irons together with 85" derrick engine house, belt house and derrick house rig made by Union Tool Company, one Crown Block, complete with sheaves, one three sheaves traveling block, one 6" swivel hook spring type, one inch calf line, one temper screw with rope clamps, one oil forge, one Star steam blower, one swivel wrench, two derrick cranes, one No. 2 Bartlett cycle jack, two 5½" tool wrenches, two wire line sockets, 2¾ x 3¾ joints, one substitute 3x4 pin, 2¾x3¾ box, one substitute 2¾x3¾ pin, 4x5 box, one latch jack for eight inch hole with 2¾x3¾ pin, one set No. 16 Vulcan chain tongs, one combination socket for eight inch hole with 2½x3½ pin, one 5-in. drill stem, 30 feet long jars and sinker bars connected, one 14½x25 drill stem, one set fishing jars, 5½ inches, one substitute, one combination socket for ten inch hole, one set casing tongs, one dun tool brace, one forgey handle, two sets five and half inch drilling jars, 2¾x3¾, 7 joints, one round fuel tank, 2'6"x8'4", two gasoline tanks 4'3"x3', 27 lengths of 8¼ casings, 4 short joints 8¼ casing, one 8" bailer 12' long, two 5½" tool wrenches, one rope socket 2½x3½, one swivel socket Canadian pattern, 2¼x3¼ joint, one substitute 2¼x3¼ pin, 2½x3½ box, one pair of 8¼ casing clamps, one water tank, wagon type, 60

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

length 2½ upset tubbing, 8 length 2-in. pipe, one wooden reel of sand line, one Premier gear driven force pump, one Fairbanks Morse steam driven mud hog pump, one three-prong grab 2¼x3¼ pin, one substitute 2½x3½ pin, 2¼x3¼ box, one set 10-in. casing clamps, one center spear, 2½x3½ pin, one center spear 2¾x3¾ pin, two 10-in. drilling bits, 3¼x4¼ pin, two 8-in. drill bits 2¾x3¾ pin, one 6-in. latch jack 2¼x3¼ pin, one casing spider with rig and slips for 8, 10 and 12 inch pipe, one 3½ inch swivel hook, one substitute 2½x3½ pin, 2¼x3¼ box, one 10-in. drill bit 2¼x3¼ pin, one substitute 2½x3½ pin, 2¾x3¾ box, one drill stem 4½x20 feet long, 2½x3½ box and pin, one set 5½ drilling jars, 2½x3¼ box and pin, one Prosser socket 2½x3½ box, one 4½ drill stem, 31 ft. 9 in. long with 2¾x3¾ pin, 3¼x4¼ box, one dart bailer valve 4¼x16 ft. long, one dart bailer valve 4¼x16 ft. long, one dart bailer 6½x12 ft. long, one Augur type bailer 3 in. tube, one cementing bailer for 3-in. tubing, one dart valve bailer, 10 in., 18 ft. long, 6 lengths of 10-in. 40-lb. weld casing, two pieces of 8-in. well casing, two lengths of 4¾ OD casing, one Swedge nipple 15½ to 8¼, one 2½-in. tubing to tool joint substitute, one swedge nipple 10 to 8, one swedge nipple 2½ to 10, one set tuble under reamer lugs, 10-in., 2000 ft. of 6x7 sandline, one [104] bit dressing ramp.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

one 250-bbl. Columbian steel bolted tank, one 4-in. drill stem, 20 ft. 8 in. long, $2\frac{1}{2}$ x $3\frac{1}{2}$ box and pin, one 8-in. control head, one wall hook for $12\frac{1}{2}$ inch hole with $3\frac{1}{4}$ x $4\frac{1}{4}$ inch pin, one pipe to tool joint substitute $3\frac{1}{4}$ x $4\frac{1}{4}$ box and pin for $8\frac{5}{8}$ OD casing, one Prosser socket $2\frac{3}{4}$ x $3\frac{3}{4}$, two $15\frac{1}{2}$ drill bits $2\frac{1}{4}$ x $3\frac{3}{4}$ pin, one $15\frac{1}{2}$ drill bit, $2\frac{3}{4}$ x $3\frac{3}{4}$ pin, one $12\frac{1}{2}$ inch under reamer, one 18-in. 3 sheaves casing block, two 8-in. drill bits $2\frac{1}{4}$ x $3\frac{1}{4}$ pin, one Burns well socket, $2\frac{1}{2}$ x $3\frac{1}{2}$ pin, one 6-in. drill bit, $2\frac{1}{2}$ x $3\frac{1}{2}$ pin, one $15\frac{1}{2}$ -in. Buiberson casing tong, one $12\frac{1}{2}$ in. Anchor wall packer, one bailer dart valve type $6\frac{3}{4}$ x20 ft. long, one dart valve bailer, 8-in.x19 ft. long.

To Have and To Hold, unto the said John Ashbeck, his heirs and assigns, to his and their own use forever.

And I do further certify that the aforesaid goods and chattels and all of them were offered for sale at public auction at the front door of the courthouse of McKinley County in Gallup, New Mexico on the 7th day of July, 1941 at the hour of ten o'clock A.M. on said day, and that the aforesaid sum of \$950.00 was bid by the said John Ashbeck and was the highest and best bid which could be obtained at that time and that the aforesaid sale was held pursuant to a Notice of Execution Sale duly made, entered and published in a certain cause

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

entitled Mary T. Christensen, plaintiff, vs. S. Dysart and New Mexico Oil Properties, defendants, which said cause was pending in the District Court of the State of New Mexico in and for the County of McKinley, and was numbered 5134 on the records of said court.

In Witness Whereof, I have hereunto set my hand and seal this 7th day of July, 1941.

D. F. MOLLICA,
Sheriff

By D. W. ROBERTS
Under Sheriff

State of New Mexico
County of McKinley—ss.

On this 7th day of July, 1941 personally appeared before me D. W. Roberts, to me known to be the person who executed the foregoing bill of sale as under sheriff of McKinley County, New Mexico, and acknowledged that he executed the same for the uses and purposes therein expressed as his free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

[Seal] MARY A. LYLE
Notary Public in and for the County of McKinley
and State of New Mexico.

My Commission expires Dec. 9, 1943.

Filed Jul. 7, 1941. [105]

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

NOTICE OF EXECUTION SALE

Public Notice Is Hereby Given:

That the undersigned sheriff of McKinley County will on the 12th day of August, 1941 at the hour of ten o'clock A. M. at the front door of the court house in Gallup, McKinley County, offer for sale at public auction to the highest and best bidder for cash the following described personal property, to-wit:

All of the pipe or casing in three certain wells named and located as follows:

Dysart No. 1 well in the Northwest quarter of the Northeast Quarter (NW $\frac{1}{4}$ of NE $\frac{1}{4}$) of Section 14, Township 14 North, Range 10 West.

Ambrosia Investors Company No. 1 well in the Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section 11, Township 14 North, Range 10 West.

S. Dysart No. 1 well in the Southwest Quarter of the Southwest Quarter (SW $\frac{1}{4}$ of SW $\frac{1}{4}$) of Section 21, Township 14 North, Range 9 West.

The foregoing property will be sold to satisfy the balance of a certain judgment entered on the 22nd

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

day of March, 1937 in a cause entitled Mary T. Christensen, plaintiff, vs. S. Dysart and New Mexico Oil Properties, defendants, and numbered 5134 on the records of the District Court in and for the County of McKinley, State of New Mexico and duly recorded in Book I at page 404 of the judgment records of said county, of which judgment there remains due and unpaid the sum of Nine Hundred and Forty-One and 68/100 (\$941.68) Dollars, together with interest to the date of the sale in the amount of Four and 75/100 (\$4.75) Dollars, together with the costs of the sale and the publishing of this notice.

The pipe will be sold in the ground, and recovery thereof will be at the risk of the buyer.

Dated this 17th day of July, 1941.

(Signed) D. F. MOLLICA,
Sheriff.

Publication:

July 18, 1941

25

Aug. 1

8

Filed Jul. 17, 1941. [106]

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

In the District Court of the State of New Mexico,
First Judicial District in and for the County
of McKinley.

No. 5134

MARY T. CHRISTENSEN,

Plaintiff,

vs.

S. DYSART and NEW MEXICO OIL PROPER-
TIES,

Defendants.

ORDER APPROVING SALE

This case having come on to be heard this 10th day of July, 1941 upon the sheriff's report of an execution sale, and the Court having carefully examined the said report and other papers filed in the cause and being fully advised herein, finds that the facts stated in the aforesaid Report of Sale are and each of them is true and correct.

The Court concludes that the aforesaid execution sale was regular in form and due notice thereof pursuant to statute was given, that the sum of \$950.00 was the highest and best bid which could be obtained and was a reasonable sum in the premises.

Now Therefore, It Is Ordered, Adjudged and Decreed, that the acts of the sheriff and the con-

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

duct of the sale be and the same hereby are approved and confirmed and the bill of sale duly executed by the aforesaid sheriff is confirmed; that the expenditure for the costs of sale were for items which were regular and according to law, and that the balance of money distributed should be applied as a credit against the judgment.

JAMES B. McGHEE,

Judge of the Fifth Judicial District sitting for and on behalf of the Hon. David Chavez, Jr., Judge of the First Judicial District.

Filed Jul 12, 1941. [107]

In the District Court of the State of New Mexico,
First Judicial District in and for the County
of McKinley

No. 5134

MARY T. CHRISTENSEN,

Plaintiff,

v.

S. DYSART and NEW MEXICO OIL
PROPERTIES,

Defendants.

REPORT OF SALE

Now comes D. F. Mollica, Sheriff of McKinley County, and makes this report of his acts and doings:

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

I.

That on the 12th day of August, 1941 at the hour of ten o'clock A.M. at the front door of the Court-house of McKinley County in Gallup, New Mexico, the undersigned did offer for sale at public auction to the highest and best bidder for cash, all the pipe in three wells as more particularly set out in the Notice of Sale duly filed herein.

II.

That the aforesaid Notice of Sale was duly published in the Gallup Independent, a newspaper of general circulation in the County of McKinley for four successive weeks as required by law, as more particularly appears from the affidavit of A. W. Barnes duly filed in this cause.

III.

That pursuant to the notice of sale, the undersigned did offer the property described in the notice to the buyers under the following condition:

"The pipe will be sold in the ground and the recovery thereof will be at the risk of the buyer."

That upon the public offering under those conditions, there was only one bid received, to-wit, the sum of One Hundred and Fifty (\$150.00) Dollars by John Ashback of Durango, Colorado; that no

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

other person attended the sale and no other bid was received, and that the aforesaid bid of \$150.00 was the highest and best bid which could be obtained under the circumstances.

IV.

That thereafter the undersigned made and executed a Bill of Sale covering the property and conveying all of the property described in the published notice of sale to the said John Ashback for consideration of \$150.00, a copy of which Bill of Sale is hereunto annexed.

V.

That the said John Ashback paid to the undersigned the sum of One Hundred and Fifty (\$150.00) Dollars, and that out of said fund there were paid the following expenses of the sale: [108]

Publication of the notice of sale

to the Gallup Independent.....\$14.78

Statutory commission, 4%, to sheriff.....\$ 6.00

And that the balance of the funds, to-wit, the sum of One Hundred and Twenty-nine and 22/100 (\$129.22) Dollars was paid over to the attorney for the plaintiff.

Wherefore, The undersigned prays that this honorable Court shall be pleased to approve and confirm his acts and doings in the premises and to

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

direct him to deliver the Bill of Sale, a copy of
which is hereunto annexed.

(Signed) D. F. MOLLICA,
 Sheriff

Filed Aug. 14, 1941. [109]

SHERIFF'S BILL OF SALE

Know All Men By These Presents:

That I, D. F. Mollica, duly elected, qualified and
acting sheriff of McKinley County, New Mexico,
for and in consideration of the sum of One Hundred
and Fifty (\$150.00) Dollars to me in hand paid by
John Ashback of Durango, Colorado, the receipt
whereof is hereby confessed and acknowledged, do
hereby bargain, sell, transfer, assign and set over
unto the said John Ashback all of the following
described goods and chattels as they now are in
the ground in the vicinity of Ambrosia Lake, Mc-
Kinley County, New Mexico, to-wit:

All of the pipe or casing in three certain
wells named and located as follows:

Dysart No. 1 well in the Northwest Quarter
of the Northeast Quarter (NW $\frac{1}{4}$ of NE $\frac{1}{4}$) of
Section 14, Township 14 North, Range 10
West,

Ambrosia Investors Company No. 1 well in
the Southeast Quarter of the Southeast Quarter
(SE $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section 11, Township
14 North, Range 10 West,

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

S. Dysart No. 1 well in the Southwest Quarter of the Southwest Quarter (SW $\frac{1}{4}$ of SW $\frac{1}{4}$) of Section 21, Township 14 North, Range 9 West.

To Have and To Hold, unto the said John Ashback, his heirs and assigns, to his and their own use forever.

And I do further certify that the aforesaid goods and chattels and all of them were offered for sale at public auction at the front door of the courthouse of McKinley County in Gallup, New Mexico, on the 12th day of August, 1941 at the hour of ten o'clock A.M., and that the aforesaid sum of \$150.00 was bid by the said John Ashback and was the highest and best bid which could be obtained at that time, and that the aforesaid sale was held pursuant to a notice of sale duly made, entered and published in a certain cause entitled Mary T. Christensen, plaintiff, vs. S. Dysart and New Mexico Oil Properties, defendants, which said cause was pending in the District Court of the State of New Mexico in and for the County of McKinley, and was numbered 5134 on the records of said court.

In Witness Whereof, I have hereunto set my hand and seal this 14th day of August, 1941.

(Signed) D. F. MOLLICA
Sheriff

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

State of New Mexico
County of McKinley—ss.

On this 14th day of August, 1941, personally appeared before me D. F. Mollica, to me known to be the person who executed the foregoing Bill of Sale as Sheriff of McKinley County, New Mexico, and acknowledged that he executed the same for the uses and purposes therein expressed as his free act and deed. [110]

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

[Seal] MARY A. LYLE
Notary Public in and for the County of McKinley
and State of New Mexico.

My commission expires Dec. 9, 1943. [111]

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

In the District Court of the State of New Mexico,
First Judicial District in and for the County
of McKinley

No. 5137

MARY T. CHRISTENSEN,

Plaintiff,

vs.

S. DYSART and NEW MEXICO OIL
PROPERTIES,

Defendants.

ORDER APPROVING SALE

This case having come on to be heard this 15 day of August, 1941 upon the sheriff's report of sale, and the Court having carefully examined the said report and other papers filed in the cause and being fully advised herein, finds that the facts stated in the aforesaid report are and each of them is true and correct.

The Court concludes that the aforesaid execution sale was regular in form and due notice thereof pursuant to statute thereof was given; that the sum of \$150.00 was the highest and best bid which could be obtained and was a reasonable sum in the premises.

Petitioning Creditors' Exhibit No. 1 for
Identification—(Continued)

Now Therefore, It Is Ordered, Adjudged and Decreed, that the acts of the sheriff and the conduct of the sale be and the same hereby are approved and confirmed, and the Bill of Sale duly executed by the sheriff is approved, and the sheriff is hereby authorized and directed to deliver said Bill of Sale to the buyer, and that the expenditure for the costs of sale in the sum of \$14.78 for publishing the notice of sale and \$6.00 as the Sheriff's commission were proper expenditures and should be first paid out of the proceeds of the sale, and that the balance, to-wit: the sum of \$129.22, should be applied as a credit against the judgment.

JAMES B. McGHEE,

Judge of the Fifth Judicial District sitting for and on behalf of the Hon. David Chavez, Jr., Judge of the First Judicial District.

Filed Aug 18, 1941. [112]

PETITIONING CREDITORS' EXHIBIT No. 2
FOR IDENTIFICATION

11/4/42

CERTIFICATE

State of New Mexico,
County of McKinley—ss.

I, Eva Ellen Sabin, Clerk of the District Court in and for said County, do hereby certify that I have compared the papers in writing, to which this certificate is attached, with the original Judgment as the same appears of record and on file in my said office, at the court house, in said County, and that the same are true and correct copy of said original Judgment, and the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Gallup, McKinley County, New Mexico this 22nd day of October, 1942.

EVA ELLEN SABIN,
Clerk.

By B. MARTINEZ,
Deputy.

CERTIFICATE

State of New Mexico,
County of Bernalillo—ss.

I, Albert R. Kool, Judge of the Second Judicial District of the State of New Mexico, do hereby certify that Eva Ellen Sabin whose name is subscribed to the foregoing certificate of attestation,

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

now is, and was, at the time of signing and sealing the same, Clerk of the District Court of McKinley County aforesaid, which County is in the First Judicial District, and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are and of right ought to be given to all her official acts as such in all court of record and elsewhere; and that her said attestation is in due form, and by the proper officer.

Given under my hand and seal this 26 day of October, 1942, at Albuquerque, Bernalillo County, New Mexico.

ALBERT R. KOOL,
District Judge of the Second Judicial District, sitting in place and stead of Honorable David Chavez, Jr., District Judge. [113]

CERTIFICATE

State of New Mexico,
County of McKinley—ss.

I, Eva Ellen Sabin, Clerk of the District Court in and for said County, in the State aforesaid, do hereby certify that Honorable Albert R. Kool, whose genuine signature is appended to the foregoing certificate, was at the time of signing the same, Judge of the Second Judicial District of the State of New Mexico, sitting for Honorable David Chavez, Jr., Judge of the First Judicial District, of which First Judicial District, the said McKinley County

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

forms a part, duly elected and qualified; that full faith and credit are and of right out to be given to all his official acts as such, in all Court of record and elsewhere.

In Testimony Where I have hereunto set my hand and affixed the seal of said Court, at my office in Gallup, McKinley County, New Mexico, this 22nd day of October, 1942.

EVA ELLEN SABIN

Clerk

By B. MARTINEZ

Deputy [114]

In the District Court of the State of New Mexico,
First Judicial District in and for the
County of McKinley

No. 5414

E. H. YOUNGBLOOD,

Plaintiff,

vs.

S. DYSART,

Defendant.

JUDGMENT

This case having come on to be heard on the 13th day of July, 1938 before the Court sitting without a jury, and the plaintiff being present in person and by his attorney, Harris K. Lyle, Esq., and the

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

defendant being present in person and by her attorney, M. J. McGuinness, Esq., and both parties having offered such evidence, both oral and documentary, as they desired, and the case having been argued and the Court being fully advised in the premises, finds as follows:

1. That the plaintiff is a resident of McKinley County, State of New Mexico.
2. That on or about the 28th day of March, 1937, or a short time prior thereto, the plaintiff was employed by the defendant, S. Dysart, to drill a well on Section Fourteen (14), township Fourteen (14) North, Range Ten (10) West, N.M.P.M., in McKinley County, New Mexico.
3. That the said employment was made by an oral contract between the parties whereby plaintiff agreed to drill the said well for the said defendant upon the said lands, and the defendant agreed to pay the plaintiff on completion of said well the sum of Two (\$2.00) Dollars per foot for the first five hundred (500) feet, and Two and 50/100 (\$2.50) Dollars per foot for everything in excess of five hundred (500) feet, and that said payment was to be made upon the completion of the said well.
4. That thereafter, to-wit, on the 28th day of March, 1937, the plaintiff commenced drilling operations, and continued said operations until, or about until, the 31st day of August, 1937, and at said time the plaintiff had drilled the said well to a depth of seven hundred and one (701) feet. [115]

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

5. That at the said depth of 701 feet a flow of water was brought in.
6. That the plaintiff did no work on said well subsequent to the 31st day of August, 1937.
7. That on the 7th day of September, 1937, the defendant directed the plaintiff to cease all further work on said well.
8. That by reason of the aforesaid contract and the aforesaid drilling, the defendant become indebted to the plaintiff in a total sum of One Thousand Five Hundred and Two and 50/100 (\$1502.50) Dollars.
9. That on August 10, 1937, there was a balance owing to plaintiff on account of drilling 500 feet, the sum of Four Hundred Six and 07/100 (\$406.07) Dollars, being Three Hundred Thirty-six and 57/100 (\$336.57) Dollars, as shown on statement of account, plaintiff's Exhibit 3, plus Sixty-nine and 50/100 (\$69.50) Dollars erroneously charged plaintiff for board; that thereafter there accrued to plaintiff the additional sum of Five Hundred Two and 50/100 (\$502.50) Dollars for drilling the additional two hundred and one (201) feet at \$2.50 per foot, and no part of such amounts were paid except Two Hundred (\$200.00) Dollars, leaving a balance due plaintiff on account of such operations of Seven Hundred and Eight and 57/100 (\$708.57) Dollars, and that said amount is due plaintiff after allowance of all just payments, credits and offsets.

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

10. That thereafter, to-wit, on the 19th day of October, 1937, the plaintiff employed an attorney and filed a claim of lien under the provisions of Chapter 82, Art. 2 of the New Mexico Statutes, 1929 Compilation, and that said claim of lien was duly executed and verified by the plaintiff and recorded in the office of the County Clerk, Ex-Officio Recorder of the County of McKinley, State of New Mexico, on the said 19th day of October, 1937, in Book 2 of Lien Records at Page 439 thereof.

11. That the plaintiff paid to the County Clerk of McKinley County the sum of One and 50/100 (\$1.50) Dollars for recording said lien. [116]

12. That the plaintiff employed an attorney at law, to-wit, Harris K. Lyle, Esq., a member of the Bar of the Supreme Court of the State of New Mexico, to prosecute this action to foreclose the aforesaid mechanics lien, and the plaintiff has incurred an obligation to pay the said attorney a reasonable fee for his services in this cause, and that a reasonable fee for the services of the aforesaid attorney is the sum of Two Hundred and Fifty (\$250.00) Dollars.

13. That the Defendant has not paid the plaintiff the sum of \$708.57, as stated in Finding No. 9 or the sum of \$250.00 as stated in Finding No. 12, or the sum of \$1.50 as stated in Finding No. 11, or any part thereof, and that the total of said items, to-wit, the sum of Nine Hundred and Sixty and

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

07/100 (\$960.07) Dollars is wholly due, owing and unpaid.

14. That the defendant secured a permit from the office of the Geological Survey, a division of the Department of the Interior of the United States of America, for the drilling of the aforesaid well as a water well.

15. That Section Fourteen (14), Township Fourteen (14), North, Range Ten (10) West, N.M.P.M., is required for the full use and enjoyment of the aforesaid well and the water to be produced and which may be produced therefrom and that said Section is owned by the defendant.

16. That the water to be produced from the well drilled by the plaintiff will enhance the value of, and add to the enjoyment and full use of Section Fourteen (14), Township Fourteen (14) North, Range Ten (10) West, N.M.P.M.

17. That the supply of water previously existing on Section 14, Township 14 North, Range 10 West, N.M.P.M. is insufficient for carrying on drilling operations by the defendant on said section, and said water will also increase the supply of water available for cattle which are grazing on said section.

18. That the allegations of the first cause of action on the cross-complaint, insofar as they may differ from the findings hereinbefore made, are not established by a preponderance of the evidence.

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

19. That the defendant and cross-complainant did not instruct the plaintiff and cross-defendant to cease all operations when he should reach the depth of six hundred (600) feet, until after said depth had been exceeded.

20. That there is no evidence to sustain the allegation of the cross-complaint that the defendant and cross-complainant was damaged in the sum of One Thousand Four Hundred and Thirty-seven and 19/100 (\$1437.19) Dollars or in any other sum because of the depth to which the said well was drilled.

21. That there is no evidence to support the allegation of the cross-complaint that the defendant and cross-complainant was damaged in the sum of Five Thousand (\$5000.00) Dollars or in any other sum by reason of the allegations that the plaintiff and cross-defendant refused to keep a log of said well and to furnish the defendant and cross-complainant with weekly reports of progress.

22. That the defendant and cross-complainant was not damaged in the sum of Five Hundred (\$500.00) Dollars or in any other sum by alleged negligence of the plaintiff and cross-defendant in performing the work of drilling said well or in recovering tools belonging to the defendant and cross-complainant which were claimed to have been lost or damaged.

23. That there is no evidence to sustain the alle-

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

gation of the second cross-complaint that the plaintiff and cross-defendant falsely or maliciously or without reason or probable cause or at all, preferred or caused to be preferred on behalf of himself, his agents or workmen, false or fraudulent claims or any other claims for compensation for injuries or for wages to the commissioners respectively of the Workmens Compensation Act and Labor for the State of New Mexico, or that the said plaintiff and cross-defendant had any intention or purpose of embarrassing the defendant and cross-complainant, or that the defendant and cross-complainant was damaged in the sum of One Thousand (\$1000.00) Dollars or in any other sum.

And the Court makes the following Conclusions of Law:

1. That there is due and owing by defendant to plaintiff the sum of Seven Hundred Eight and 57/100 (\$708.57) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from the 31st day of August, 1937, until the date of this judgment, and the further sum of One [118] and 50/100 (\$1.50) Dollars, expended for the filing of a claim of lien, and the further sum of Two Hundred Fifty (\$250.00) as an attorney's fee, and that the plaintiff be entitled to a lien on Section Fourteen (14), Township Fourteen (14) North, Range Ten (10) West, N.M.P.M., lying in McKinley County, New Mexico, to secure the payment of

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

the total sum of Nine Hundred Sixty and 07/100 (\$960.07) Dollars, together with costs of this action, and interest on the sum of Seven Hundred Eight and 57/100 (\$708.57) Dollars, at the rate of six (6%) per cent per annum, from the 31st day of August, 1937, until the date of the judgment in this cause.

2. That the plaintiff is entitled to foreclose the aforesaid lien, and that unless the defendant shall pay the amounts herein found due from the defendant to the plaintiff, together with interest and costs, that the aforesaid Section Fourteen (14), Township Fourteen (14) North, Range Ten (10) West, N.M.P.M., or as much thereof as may be necessary, should be sold according to law to satisfy the aforesaid lien.

3. That the defendant and cross-complaint take nothing by her first cross-complaint filed herein, and that the same should *by* dismissed with prejudice.

4. That the defendant and cross-complaint take nothing by her second cross-complaint filed herein, and that the same should be dismissed with prejudice.

Now Therefore, It Is Ordered, Adjudged and Decreed, that the plaintiff do have and recover of the defendant the sum of Seven Hundred and Eight and 57/100 (\$708.57) Dollars, together with interest thereon at the rate of six (6%) per cent

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

per annum from the 31st day of August, 1937 to the date hereof, to-wit, the sum of Thirty-eight and 97/100 (\$38.97) Dollars, together with the further sum of One and 50/100 (\$1.50) Dollars expended for the filing of the claim of lien, and the further sum of Two Hundred and Fifty (\$250.00) Dollars as an attorney's fee, together with the costs of this action which have been taxed by the Clerk of this Court in the sum of One Hundred and Six and 85/100 (\$106.85) Dollars, making in all the total sum of One Thousand One Hundred and Five and 89/100 (\$1105.89) Dollars. [119]

It Is Further Ordered, Adjudged and Decreed, that the plaintiff do have a lien on Section Fourteen (14), Township Fourteen (14) North, Range Ten (10) West, N.M.P.M., for the satisfaction of the aforesaid judgment.

It Is Further Ordered, Adjudged and Decreed, that, unless the defendant shall pay to the plaintiff the aforesaid sum of Eleven Thousand One Hundred and Five and 89/100 (\$1105.89) Dollars together with interest thereon at the rate of six (6%) per cent per annum from the date hereof until paid, the said Section 14, Township 14 North, Range 10 West, N.M.P.M. or so much thereof as shall be necessary shall be sold according to law to satisfy this judgment and the costs of sale.

It Is Further Ordered, Adjudged and Decreed, that in the event the above described property shall

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

be sold, the plaintiff may become a purchaser at said sale.

Dated this 24 day of August, 1938.

(Signed) IRWIN S. MOISE

District Judge of the Fourth
Judicial District of the
State of New Mexico,
sitting by designation for
the Honorable David Cha-
vez, Jr., Judge of the First
Judicil District of the
State of New Mexico.

Filed Aug. 25, 1938. [120]

In the District Court of the State of New Mexico,
First Judicial District in and for the
County of McKinley

No. 5414

E. H. YOUNGBLOOD,

Plaintiff,

vs.

S. DYSART,

Defendant.

SPECIAL MASTER'S REPORT

Now comes W. M. Bickel, duly appointed special master in the above captioned case, and makes this his report of his acts and doings in the premises.

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

I.

That W. M. Bickel was on the 12th day of May, 1941 duly appointed as special master in the above captioned case; that the said special master published a notice of foreclosure sale for four successive weeks, the first publication being on the 23rd day of July, 1941 and the fourth on the 13th day of August, 1941, in the Gallup Independent, a newspaper of general circulation in the County of McKinley, State of New Mexico, as more particularly appears from the affidavit of A. W. Barnes duly filed in this cause.

II.

That, pursuant to the aforesaid notice, the undersigned did on the 21st day of August, 1941 at the hour of ten o'clock A. M. at the front door of the court house of McKinley County in Gallup, New Mexico offer for sale at public auction to the highest and best bidder for cash, the following described real estate lying, situate and being in the County of McKinley, State of New Mexico, to-wit:

All of Section Fourteen (14), Township Fourteen (14) North, Range Ten (10) West,
N.M.P.M.

III.

That the undersigned offered for sale as aforesaid all of the right, title and interest of the plaintiff by virtue of the judgment in the above cap-

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

tioned cause, and that upon the reading of the notice of sale and the offering thereof pursuant to the terms of the notice, the undersigned received no bids for any part of said land less than the entire section; that E. H. Youngblood, plaintiff in the above captioned cause, bid the sum of One Thousand Three Hundred and Thirty-nine and 83/100 (\$1339.83) Dollars; that no other or better bids were received and that upon information and belief your special master states that the aforesaid bid is a fair and proper price for the aforesaid land; that no other and better bid could be received, and that the bid is sufficient to satisfy the judgment of the plaintiff.

IV.

That, pursuant to the aforesaid bid, the undersigned has prepared and executed a special master's deed, a copy of which is hereunto annexed and marked Exhibit "A". [121]

V.

That the costs and expenses of the sale are as follows:

Documentary stamps to be affixed to deed	\$ 1.65
Publication of notice of sale	11.73
Recording of special master's deed	1.50
Special master's fee	20.00
	—
Total	\$34.88

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

leaving a balance of One Thousand Three Hundred and Four and 95/100 (\$1304.95) Dollars; that said sum is exactly equal to the judgment of the plaintiff in the sum of One Thousand One Hundred and Five and 89/100 (\$1105.89) Dollars plus interest thereon to the date of the sale in the sum of One Hundred and Ninety-nine and 06/100 (\$199.06) Dollars; that the plaintiff has paid the costs of the sale and has taken credit for the amount of his judgment against the bid, leaving no funds whatever to be disbursed to the defendant.

Wherefore, your special master prays that this Honorable Court may be pleased to enter its order confirming and approving said sale and directing the special master to deliver the deed, a copy of which is hereunto annexed, and discharging your special master from all further obligations in the premises.

(Signed) **W. M. BICKEL**
Special Master

State of New Mexico
County of McKinley—ss.

W. M. Bickel, being first duly sworn, deposes and says that he is the special master whose name is subscribed to the foregoing report; that he has read the same and knows the contents thereof, and the same is true of his own knowledge except as to those

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

matters stated upon information and belief, and as to those matters he believes it to be true.

(Signed) W. M. BICKEL

Subscribed and sworn to this 21st day of August, 1941, before me,

[Seal] MARY A. LYLE
Notary Public In and For the County of McKinley
and State of New Mexico.

My commission expires: Dec. 9, 1943.

Filed Aug. 23, 1941. [122]

EXHIBIT "A"

SPECIAL MASTER'S DEED

Know All Men by These Presents:

That Whereas, the undersigned, W. M. Bickel, was on the 12th day of May, 1941 duly appointed special master in a certain cause entitled E. H. Youngblood, plaintiff, against S. Dysart, defendant, pending in the District Court of the State of New Mexico, First Judicial District in and for the County of McKinley, and numbered 5414 on the records of said court, and,

Whereas, the special master did, pursuant to the terms of the aforesaid order publish notice according to law that he would on the 21st day of August, 1941 at the hour of ten o'clock A. M. at the front door of the court house of McKinley County in Gallup, New Mexico offer for sale at public auction

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

to the highest and best bidder for cash all of the following described real estate, to-wit:

All of Section Fourteen (14), Township Fourteen (14) North, Range Ten (10) West, N.M.P.M.

and,

Whereas, the plaintiff E. H. Youngblood was the highest and best bidder at said auction and did offer to pay for said premises the total sum of One Thousand Three Hundred and Thirty-nine and 83/100 (\$1339.83) Dollars, and,

Whereas, no other and better bid could be secured, and the special master has reported the foregoing facts and circumstances to the above entitled court and the court has by order approved and confirmed the actions of the special master and has ordered and directed him to deliver this deed to E. H. Youngblood;

Now Therefore, I, W. M. Bickel, as special master acting in pursuance of and by cirtue of the aforesaid judgment and order confirming the sale duly made and entered in the records of the District Court of the State of New Mexico in and for the County of McKinley, in consideration of the sum of One Thousand Three Hundred and Thirty-nine and 83/100 (\$1339.83) Dollars to me in hand paid by E. H. Youngblood of Gallup, New Mexico, the receipt whereof is hereby confessed

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

and acknowledged, do hereby bargain, sell, remise, release and forever quitclaim unto the said E. H. Youngblood all those certain lots or parcels of real estate lying, situate and being in the County of McKinley, State of New Mexico, and more particularly described as follows:

All of Section Fourteen (14) Township
Fourteen (14) North, Range Ten (10) West,
N.M.P.M.

To Have and to Hold, the aforesaid premises and all of it, with all the rights, easements and appurtenances thereunto belonging, unto the said E. H. Youngblood, his heirs and assigns, to his and their own use forever.

And I, the special master, for myself, my heirs, executors and administrators, do covenant with the aforesaid E. H. Youngblood, his heirs and assigns, that the aforesaid premises are free from any and all encumbrances made or created by me and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said E. H. Youngblood, his heirs and [123] assigns, that the aforesaid premises are free from any and all encumbrances made or created by me and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said E. H. Youngblood, his heirs and assigns, forever against the lawful claims and demands of all persons claiming by, through or under me, but against none other.

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

In Witness Whereof, I have hereunto set my hand and seal as special master this 21st day of August, 1942.

(Signed) W. M. BICKEL,
 Special Master.

State of New Mexico,
County of McKinley—ss.

On this 21st day of August, 1941, personally appeared before me W. M. Bickel, to me known to be the person described in and who executed the foregoing Special Master's Deed, and acknowledged that he executed the same as special master and as his free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

MARY A. LYLE,
Notary Public in and for the County of McKinley
and State of New Mexico.

My commission expires: Dec. 9, 1943 [Seal] [124]

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)In the District Court of the State of New Mexico,
First Judicial District in and for the
County of McKinley

No. 5414

E. H. YOUNGBLOOD,

Plaintiff

v.

S. DYSART,

Defendant.

ORDER APPROVING SALE

This case having come on to be heard this 22 day of August, 1941 upon the report of the special master duly filed herein, and the Court being fully advised in the premises, finds as follows:

That the allegations of the special master's report are and each of them is true and correct, and the Court adopts the same as the findings of fact in this matter; that the sum of One Thousand three Hundred and Thirty-nine and 83/100 (\$1339.83) Dollars is a fair and proper price for the land; that no other and better bid could be received; that the expenses of the sale as reported by the special master are just and proper.

And the Court concludes that the special master's report should be approved and confirmed, and that the special master should be directed to de-

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

liver~~e~~ the deed and to apply the proceeds of the sale in payment of the costs and in full satisfaction of the judgment.

Now Therefore, It Is Ordered, Adjudged and Decreed, that the acts and doings of the special master and the sale conducted by him be and they hereby are approved, and the special master is hereby ordered and directed to deliver to E. H. Youngblood the original special master's deed, a copy of which is annexed to the report of the special master.

It Is Further Ordered, Adjudged and Decreed, that the special master apply the proceeds of the sale as follows:

Total price	\$1339.83
Documentary stamps for	
deed	\$ 1.65
Publication of notice of sale	11.73
Recording of deed.....	1.50
Special master's fee.....	20.00
Credit against judgment in	
full judgment	1105.89
Interest to date of sale..	199.06
	<hr/>
	\$1339.83 \$1339.83

It Is Further Ordered, Adjudged and Decreed, that, there being no further moneys to disburse,

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

the special master is hereby discharged of and from any and all further liability in the premises.

IRWIN S. MOISE,
Judge of the Fourth Judicial District sitting by designation for and on behalf of the Honorable David Chavez, Jr., Judge of the First Judicial District of the State of New Mexico.

Filed Aug. 23, 1941. [125]

In the District Court of the State of New Mexico,
First Judicial District in and for the
County of McKinley

No. 5414

E. H. YOUNGBLOOD,

Plaintiff

v.

S. DYSART,

Plaintiff?

ORDER APPOINTING SPECIAL MASTER

This case having come on to be heard this 12 day of May, 1941 upon the motion of the plaintiff for the appointment of a special master to conduct the sale of the property to satisfy the judgment and lien duly established by the final decree in this case, and it appearing to the Court that W. M. Bickel is a fit and proper person to act as

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

special master, and the Court being fully advised in the premises;

Now Therefore, It Is Ordered, Adjudged and Decreed, that W. M. Bickel of Gallup, New Mexico be and he hereby is appointed and designated as special master, with power to advertise and sell property which has been made subject to the lien of the plaintiff in the above captioned cause.

IRWIN S. MOISE

District Judge of the Fourth Judicial district of the State of New Mexico, sitting by designation for the Honorable David Chavez, Jr., Judge of the First Judicial Distfict of the State of New Mexico.

Filed May 13, 1941. [126]

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

the special master is hereby discharged of and from any and all further liability in the premises.

IRWIN S. MOISE,
Judge of the Fourth Judicial District sitting by designation for and on behalf of the Honorable David Chavez, Jr., Judge of the First Judicial District of the State of New Mexico.

Filed Aug. 23, 1941. [125]

In the District Court of the State of New Mexico,
First Judicial District in and for the
County of McKinley

No. 5414

E. H. YOUNGBLOOD,

Plaintiff

v.

S. DYSART,

Plaintiff?

ORDER APPOINTING SPECIAL MASTER

This case having come on to be heard this 12 day of May, 1941 upon the motion of the plaintiff for the appointment of a special master to conduct the sale of the property to satisfy the judgment and lien duly established by the final decree in this case, and it appearing to the Court that W. M. Bickel is a fit and proper person to act as

Petitioning Creditors' Exhibit No. 2
for Identification—(Continued)

special master, and the Court being fully advised in the premises;

Now Therefore, It Is Ordered, Adjudged and Decreed, that W. M. Bickel of Gallup, New Mexico be and he hereby is appointed and designated as special master, with power to advertise and sell property which has been made subject to the lien of the plaintiff in the above captioned cause.

IRWIN S. MOISE

District Judge of the Fourth Judicial district of the State of New Mexico, sitting by designation for the Honorable David Chavez, Jr., Judge of the First Judicial Distfict of the State of New Mexico.

Filed May 13, 1941. [126]

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy

No. 38877-M

In the Matter of

STELLA DYSART, Individually, and STELLA DYSART also doing business as the Ambrosia Club and the Mutual Land Owners Limited,

Alleged Bankrupt.

FINDINGS, CONCLUSIONS AND
JUDGMENT OF DISMISSAL.

The above entitled proceedings, being an involuntary petition of creditors and intervening creditors against the above named alleged bankrupt, coming on regularly to be heard before me, the Honorable Leon R. Yankwich, the undersigned judge, for trial, the demand heretofore made by the alleged bankrupt for a jury in the above entitled matter having been withdrawn in open court, and a jury having been waived by the petitioners and by the alleged bankrupt in open court, on the 4th day of November, 1942, at 10 A.M. thereof, the petitioners being represented by their attorneys, Rupert B. Turnbull and L. H. Phillips, and the alleged bankrupt being represented by her attorneys, Hiram E. Casey and S. Bernard Wager, the court proceeded to hear the said matter.

Thereupon the petitioners offered in evidence an authenticated copy of the judgment and executions,

notice of [127] sale, Sheriff's return of sales, and order of court approving Sheriff's sales in the matter of Mary T. Christensen, plaintiff, vs. S. Dysart, et al., which said matter was an action filed by the said Mary T. Christensen in the First Judiciary District Court of the County of McKinley, in the State of New Mexico, and numbered therein No. 5134. The petitioners announced that the purpose of the offer of said authenticated documents was to prove the acts of bankruptcy alleged in the petitions on file in this bankruptcy proceeding. It was stipulated by and on the behalf of the petitioners herein and of the alleged bankrupt, that at the date of the docketing of the judgment set forth in the said exhibit so offered, to-wit: the 22nd day of March, 1937, that the law of the State of New Mexico made the judgment a lien on any real property of the defendants in the County of McKinley, State of New Mexico. An objection on behalf of the alleged bankrupt to the introduction of the said exhibit so offered by the said petitioners was sustained.

The said petitioners offered an authenticated copy of the judgment, execution, Sheriff's return of sale, and court's order approving Sheriff's sale, and proceedings in the matter of E. H. Youngblood vs. S. Dysart, which had been filed in the First Judiciary District Court of the County of McKinley, State of New Mexico, and numbered therein No. 5414. An objection was made to the said offer on behalf of the alleged bankrupt, and the court admitted the said authenticated documents for the sole purpose of proving and showing that at the date of the pro-

curement of the said judgment in the last aforesaid action, the said alleged bankrupt, S. Dysart, was the owner of real property that stood in her name in the County of McKinley, State of New Mexico.

The petitioners then made an offer of proof to prove that each and every petitioning creditor set forth in the original petition filed herein on the 5th day of July, 1941, [128] and each and every intervening petitioning creditor named and set forth in the petition of creditors to intervene, and supplemental involuntary petition of creditors filed herein on the 29th day of July, 1941, and every intervening petitioning creditor named and set forth in the petition of creditors to intervene, and supplemental involuntary petition of creditors filed herein on the 17th day of October, 1941, had provable claims against the said alleged bankrupt at the time and in the amounts set forth in the aforesaid petitions, and further offered to prove that at the times set forth in the said petitions, the said petitioning and intervening petitioning creditors had provable claims against the said alleged bankrupt in the sum in excess of Five Hundred (\$500.00) Dollars, which were past due and unpaid, and that at the times set forth in the said petitions the said bankrupt owed debts in excess of One Thousand (\$1,000.00) Dollars, and further offered to prove that at all of the times set forth and mentioned in the said petitions and at the dates of the alleged acts of bankruptcy that the said alleged bankrupt was insolvent. The said alleged bankrupt thereupon resisted the offers of proof, which said resistance was

sustained by the court and the offers of proof denied.

CONCLUSIONS OF LAW

As a conclusion the court therefrom herewith decides and determines that the said alleged act of bankruptcy presented by the petitioners herein is not an act of bankruptcy as provided by the National Bankruptcy Act and its amendments, and that the said petitions of the said petitioning creditors and the intervening petitioning creditors as filed herein should be each of them dismissed.

Wherefore by reason of the foregoing, it is ordered, adjudged and decreed that the petitions of the petitioning creditors filed herein on the 5th day of July, 1941, the 29th [129] day of July, 1941, and on the 17th day of October, 1941, be and the same are, and each of them are hereby dismissed with costs to the alleged bankrupt.

It Is So Ordered.

Dated: November 7th, 1942.

LEON R. YANKWICH

United States District Court

Judge.

Approved as to form

RUPERT B. TURNBULL &

L. H. PHILLIPS

By RUPERT B. TURNBULL
Attorneys for Petitioners.

[Endorsed]: Filed Nov. 7, 1942. [130]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Stella Dysart, Bankrupt, and to Hiram E. Casey, and S. Bernard Wager, Attorneys for Bankrupt, and to the Clerk of the above entitled Court:

You and each of you Will Please Take Notice that the petitioning creditors and the intervening petitioning creditors, and each of them, in the above entitled matter, is appealing, and does hereby appeal from the judgment of dismissal in the above entitled matter, the said dismissal being entitled "Findings, Conclusions and Judgment of Dismissal", and being made on or about the 7th day of November, 1942, and entered on or about the 7th day of November, 1942, said judgment having been signed by the Honorable Leon R. Yankwich, Judge of the United States District Court, whereby the bankruptcy proceedings herein, as instituted by the original petitioning creditors and joined in [131] by the intervening petitioning creditors, was dismissed.

Dated: Los Angeles, California, November 19, 1942.

L. H. PHILLIPS and
RUPERT B. TURNBULL
By L. H. PHILLIPS

Attorneys for the Petitioning
Creditors and the Interven-
ing Creditors.

Mailed copy to attorneys for alleged bankrupt
11/24/42.

[Endorsed]: Filed Nov. 23, 1942. [132]

[Title of District Court and Cause.]

NOTICE TO THE CLERK OF THE COURT OF
THE NAMES AND ADDRESSES OF THE
PERSONS ENTITLED TO NOTICE OF
APPEAL.

We have this day filed our Notice of Appeal in this matter. The persons of record entitled to Notice of Appeal are:

Hiram E. Casey, Room 535 Rowan Building, 5th & Spring Sts., Los Angeles, California, as one of the attorneys for the bankrupt;

S. Bernard Wager, Room 1127 Pacific National Building, 315 West 9th Street, Los Angeles, California, as one of the attorneys for the bankrupt.

Dated this 19th day of November, 1942.

RUPERT B. TURNBULL and
L. H. PHILLIPS.

By L. H. PHILLIPS,

Attorneys for Petitioning
Creditors and Intervening
Creditors.

Received copy of the within Notice this 23 day of Nov. 1942 at 10:50 A. M. o'clock.

HIRAM E. CASEY and
S. BERNARD WAGER,
Attorneys for Bankrupt.

[Endorsed]: Filed Nov. 23, 1942. [133]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, John Frear, John S. Cross, Valeria C. Painter, Hugo Von Segerlund, Alice Von Segerlund and Florence Kee Brown, principals, and The Aetna Casualty and Surety Company, a corporation, as surety, are held and firmly bound unto Stella Dysart, jointly and severally, in the sum of Two Hundred Fifty (\$250.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our administrators, successors and assigns, jointly and severally by these presents,

Whereas, a judgment was entered in the above entitled proceedings by the District Court of the United States for the Southern District of California, Central Division on the 7th day of November, 1942, dismissing the bankruptcy proceeding herein, to wit, In the Matter of Stella [138] Dysart, Bankrupt, from which order the petitioning creditors and intervening petitioning creditors have perfected their appeal to the United States Circuit Court of Appeal, Ninth Circuit.

Whereas, under the law, it is required that appellants give their bond on appeal in the sum of Two Hundred and Fifty (\$250.00) Dollars,

Now, Therefore, the condition of this obligation is such that if the above named appellants shall prosecute their appeal to effect an answer on costs, if they may fail to make said appeal good, then

this obligation shall be void, otherwise the same shall be and remain in full force and effect; that in case of default or contumacy on the part of the principals or surety, the Court may upon notice to them of not less than ten days proceed summarily and render judgment against them or either of them, in accordance with their obligation, and award execution thereon.

Sealed with our seals and dated this 20th day of November, 1942.

JOHN FREAR,
JOHN S. CROSS,
VALERIA C. PAINTER,
HUGO VON SEGERLUND,
ALICE VON SEGERLUND and
FLORENCE KEE BROWN.

By L. H. PHILLIPS,

Attorney of Record.

THE AETNA CASUALTY AND
SURETY COMPANY.

By F. X. SCHOEFER,

Resident Vice President.

Attest:

J. M. CLARK,

Resident Assistant Secretary.

State of California,

County of Los Angeles—ss.

On this 20th day of November, in the year nineteen hundred forty-two, before me, C. A. Akin, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared F. X. Schoefer, known to me to be the Resident Vice-

President and J. M. Clark, known to me to be the Resident Assistant Secretary of The Aetna Casualty and Surety Company, the corporation which executed the within and annexed instrument and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

C. A. AKIN,

Notary Public in and for said Los Angeles County,
State of California.

Notary Public in and for the County *to* Los Angeles, State of California.

My Commission Expires February 21, 1943.

State of California,
County of Los Angeles—ss.

On this 20 day of November, A.D. 1942 before me, a Notary Public in and for said County and State, personally appeared L. H. Phillips known to me (or proved to me on the oath of), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

DAVID SCHWARTZ,

Notary Public in and for said County and State.

The within bond, given by and on behalf of the appellants, petitioning creditors and intervening petitioning creditors herein, is hereby approved, and this approval shall and does constitute a permission on the part of this Court in allowing said appeal.

Dated this 23rd day of November, 1942.

LEON R. YANKWICH,
United States District Judge.

Received copy of the within Cost Bond this 23 day of Nov. 1942, 10:50 A. M.

HIRAM E. CASEY and
S. BERNARD WAGER,
Attorneys for Bankrupt. [140]

[Endorsed]: Filed Nov. 23, 1942.

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
APPELLANT MAY FILE RECORD ON
APPEAL.

Good cause appearing therefor and it appearing to the Court that the Court Reporter and Clerk of Court herein have not filed Transcript of Reporter's Record in this proceeding,

Now Therefore It Is Ordered that the Appellant, the Petitioning Creditors and the intervening Petitioning Creditors and each of them may

have to and including the 7th day of January, 1943, within which to file with the Clerk of the United States Circuit Court of the Ninth Circuit the record on appeal herein.

Dated this 7th day of December, 1942.

LEON R. YANKWICH,
District Judge.

[Endorsed]: Filed Dec. 7, 1942.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 145, inclusive, contain full, true and correct copies of Involuntary Petition by Six Creditors; Petition of Creditors to Intervene and Supplemental Involuntary Petition by Creditors (William Pietsch et al); Petition of Creditors to Intervene and Supplemental Involuntary Petition by Creditors (W. H. Borton et al); Answer of Stella Dysart, et al., to Involuntary Petition by Six Creditors; Answer of Stella Dysart, et al., to Petition of Creditors to Intervene and Supplemental Involuntary Petition by Creditors William Pietsch, et al; Answer of Stella Dysart, et al., to Petition of Creditors to Intervene and Supplemental Involuntary Petition by Creditors W. H. Borton, et al.; Bill of Particulars to Make More

Certain; Petitioning Creditors' Exhibits 1 and 2 for Identification; Findings, Conclusions and Judgment of Dismissal; Notice of Appeal; Notice to the Clerk of the Court of the Names and Addresses of the Persons Entitled to Notice of Appeal; Statement of Points on which Appellants Intend to Rely; Cost Bond on Appeal; Designation by Appellants of Contents of Record on Appeal; Order extending time to Docket Appeal and Request and Designation by Appellee for Additional Contents of Record on Appeal which, together with Original Reporter's Transcript transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$30.80 which amount has been paid to me by Appellants.

Witness my hand and the seal of the said District Court this 29 day of December, A. D. 1942.

[Seal] EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE,
Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS ON TRIAL

Appearances:

Hiram E. Casey, Esq., and S. Bernard Wager,
Esq., for Stella Dysart, respondent.

Rupert B. Turnbull, Esq., and L. H. Phillips,
Esq., for petitioning creditors.

Los Angeles, California,
Wednesday, November 4, 1942

10 A. M.

The Court: Are there any ex parte matters?
(No response.)

Mr. Casey: I would like to have the record
show my association in this case, your Honor. I
filed it this morning in the Dysart case.

The Court: On which side? For the respondent?

Mr. Casey: For the respondent.

The Court: All right.

The Clerk: Jury trial in the case of Stella Dysart, alleged bankrupt, No. 38,877-Bankruptcy.

Mr. Turnbull: Ready for the petitioning creditors and the intervening creditors.

Mr. Casey: Ready for the respondent.

The Court: Do you gentlemen want a jury?

Mr. Casey: Yes.

The Court: I am frank to say, gentlemen, it is going to be very difficult to submit all the compli-

cated issues that are involved with these cross references to a jury.

Mr. Casey: May we have just a short conference?

The Court: I have read the pleadings here. They are so complicated that even Judge McCormick had to appoint a master to thrash them out and see who is claiming what and which, a lot of claims by women, \$100, \$50; and some of them dating away back for years and then a lot of interveners, two [2*] separate sets.

I am not interested in the matter, but it does seem to me that a complicated case like this would be very difficult to submit to a jury. I have submitted more complicated matters than this; however, ultimately where a person has committed an act of bankruptcy it is a matter of law.

Mr. Casey: May I have this suggestion from the court: In the event a jury is waived, would the matter be tried by the court and not be referred to a master?

The Court: I never refer to a master. I don't like masters, as you well know. I don't like masters, whether they are referees in bankruptcy or not. I am very jealous of my prerogative as a Judge. I don't like anybody to take it.

If a jury is waived, I shall proceed to try the case now. It is the first order of business and the only order of business I have.

Mr. Casey: We have no objection to the referee.

* Page numbering appearing at top of page of original Reporter's Transcript.

The Court: No, I don't do that. I don't believe in masters. I have told you before that I don't believe in masters and have never changed my attitude since I went on this bench. I never use masters except to find an accounting. The few times I have done it I have had to do the work over again, with all respect to the masters and to the other Judges using them.

Mr. Casey: May it please your Honor, we are prepared on [3] behalf of the respondents at this time to waive the jury. Of course, in view of what your Honor has stated, it will be tried by the court, if we file a written waiver.

The Court: Of course, this is not a criminal case. It is a civil case. What do you say, Mr. Turnbull?

Mr. Turnbull: We did not demand a jury.

The Court: I know you did not.

Mr. Turnbull: And we are not demanding one now.

The Court: All right. Then the jury—

The Clerk: Is excused until notified.

The Court: The respondents have waived the written request for a jury heretofore made. The cause will be tried without a jury. I will order a reporter, and you gentlemen will divide the costs. The members of the panel who are here will be excused until further notice. One gentleman whose name I forget, the juror who wanted to discuss with me the possibility of being excused and to whom I told to go to Judge McCormick will now go to Judge McCormick who empanels the jury

and state his troubles to him or his secretary and abide by whatever decision is made there. You gentlemen may withdraw.

All right, gentlemen, let's proceed.

Mr. Turnbull: Your Honor has read the pleadings. There is no necessity for our making a statement.

The Court: Yes, I have read the pleadings and I have read the decision of the Special Master to whom the question [4] of sufficient pleading was referred and the order of Judge McCormick.

Mr. Turnbull: There was a previous bankruptcy proceeding which resulted in adjudication by the Circuit Court and reverse of it by the United States Circuit Court of Appeal on the ground that the act of bankruptcy was not completely proven. I make that statement because some of the records that are being brought here from New Mexico today will be complete, whereas heretofore they were not.

The Court: All right.

Mr. Turnbull: The petitioning creditors and the intervening creditors at this time offer in evidence an exemplified copy of a record of a proceeding in which Mary T. Christensen is plaintiff and judgment creditor and in which the alleged bankrupt, Stella Dysart, was defendant. That record is one bearing the certificate of Eva Ellen Saben, the clerk of the District Court in and for the County of McKinley, New Mexico; the certificate of District Just Kool, and the certificate of Eva Ellen Saben, the clerk of the court, that the Judge is

the Judge, which certificates on the part of the clerk are under seal of that court and which record, so certified, consists first of a judgment in favor of Mary T. Christensen against Stella Dysart, as appears on its face, a series of executions, particularly one we are interested in here, however, being the one containing the sheriff's levy and the sale of which was had [5] on the 7th of July, 1941.

The Court: Is that in support of Paragraph 6 of your original petition?

Mr. Turnbull: I don't know the number. It is the one of Mary T. Christensen's judgment.

The Court: Yes.

Mr. Turnbull: It appears that the procedure in New Mexico is that after the sheriff makes a sale he reports that sale to the court, and the court makes, and apparently in this case made, an order approving the sale. But the record here being offered is the judgment, the execution of 1941, with respect to the sale of the 7th of July, 1941, and the sheriff's bill of sale and the order approving the sale as made by the Judge of the court.

Mr. Casey: To which we object upon the grounds that the offer is irrevelant, incompetent, immaterial. The judgment shows upon its face that it became a judgment, I think, either the 22nd of February, 1937, docketed March 27, 1937; therefore, became a lien upon the real property of the respondent and, therefore, the act of bankruptey is more than four months prior to the institution of these proceedings. That was one of the points made in the Circuit Court decision, the procurement of the lien

being the date of demarcation and not the date of the subsequent sale; on the further ground that the so-called authenticated record now offered is not complete, does not contain the prior executions showing that they were prior executions; therefore, [6] that the alleged act of bankruptcy is not within the four-month period, the point being a sale made on May 5, 1941, on a judgment that was secured by a lien and by prior executions is not an act of bankruptcy and cannot be;

On the further ground, as I recall—I only saw the record this morning, and I may be mistaken—that sale is reported sometime in August and I think the sale plead as an act of bankruptcy was May the 5th or July the 7th.

Mr. Turnbull: If your Honor please, I am not responsible for the pleading in the other case. I know what it is, and the point raised in that case is not the point raised here. The act of bankruptcy in the instant pleading is the failure of the alleged bankrupt to cause to be removed. The lien of a writ of execution within at least five days prior to a sale is, according to the language of the statute, "A sale or other disposition thereof."

This is personal property, not real property, that is being sold, your Honor, that we are interested in.

The Court: Let us read the section again.

Mr. Turnbull: Yes, your Honor. It is under Section Fourteen of the Bankruptcy Act.

Mr. Casey: Section Fourteen? I think you are wrong. That is "Discharges."

Mr. Turnbull: Section Fourteen is "Discharges." It is Section Twelve.

Mr. Casey. There is no Section Twelve. [7]

The Court: I remember the section because I read it recently.

Mr. Turnbull: Section Twelve was repealed.

Mr. Casey: It is Section Three.

Mr. Turnbull: Section Three?

The Court: That is the beginning of the definition section, defining it. That is it.

Mr. Turnbull: No. It is subsection 3 of Section Three.

The Court: That's right.

Mr. Turnbull: Chapter III.

The Court: That is it.

Mr. Turnbull: That is the 30-section. It says: "* * * or at least five days before the date set for any sale or other disposition of property * * *"

Now, I will make the statement, your Honor, that this exemplified record shows the sale personally, and that is the way it is alleged in the petition. Incidentally, it does sell real property; but that is a part of the record here.

The Court: Let me look at the exemplified record.

Assuming, Mr. Casey, in the absence of a showing to the contrary, that the law of New Mexico is the same as the law of California, the lien of the judgment in California would not run as to personal property until levy. It is only as to real property standing in the name of the judgment debtor that automatically the judgment works in

the county in which it is rendered. Even as to the property outside of [8] the county you are required to record in another county a copy of the judgment or an abstract of the judgment before the lien attaches.

The sale here is apparently personal property, and no lien attaches automatically through the entry of judgment in the absence of a levy. If there was a levy, then, of course, it attaches at the time of levy.

Mr. Casey: That is correct, the further point being made at the time of the issuance and levy of this execution in 1941—I don't know whether the date is May 5th or July 7th—this involuntary was filed on the 5th of July.

Mr. Turnbull: That is right. The original petition was filed on the 5th, and the allegation is that the sale was set for the 7th and that within the 5-day limit the respondent had not set it aside. That is the language of the statute, "Had not made any other disposition," and the property was going to sale on the 7th.

Mr. Casey: I don't know what the record shows.

Mr. Turnbull: The record shows that the sale was had on the 7th by the sheriff.

The Court: The notice of execution sale given by the sheriff is dated the 10th day of June, 1941. It shows publication July 11, 18 and 25th; it shows notice that a sale would be held on the 7th day of July, 1941.

Mr. Casey: Then the point in addition to that is made, at the time of the issuance of that execu-

tion that judgment [9] was already a lien upon real property of this respondent in the County of McKinley, State of New Mexico, by virtue of the docketing of the judgment in the office of the County Clerk.

The Court: But there was no sale of real property. It could not be a sale of personal property.

Mr. Casey: No. But if it is a lien, if the judgment is secured by a lien and then is not taken care of by discharge in some way or other, that is an act of bankruptcy.

The Court: Yes, I understand that. I read the case, a very interesting case, decided by Judge McCulloch. I think it is in 88 Fed. (2d). In that case a lien of attachment was run through the case in the Circuit Court of Oregon which is like our Superior Court, and the defendant, the alleged bankrupt, succeeded in beating the case. I mean, judgment for the defendant automatically discharged the lien. Judge McCulloch under the circumstances felt that the section should read "a valid execution" but the Circuit said that it does not make any difference whether the execution is valid or not; if it was suffered while he was insolvent, the fact that he was ultimately the victor in the case didn't affect him. I think you know the case.

Mr. Casey: Yes, I know the case. The point I have is this: Christensen here in 1937 procured a judgment against respondent Dysart. That judgment became a lien upon property of a greater value than the amount of the judgment. [10] That

created a secured judgment or claim of Christensen.

Now, then, after she procured that judgment, after Mrs. Christensen procured her judgment in 1937, she issued an execution and collected part of it.

I say that the act of bankruptcy, which petitioning creditors can take advantage of, was the procurement on the first date of the lien of the judgment in 1937 and that issuance of execution more than four months subsequent to the docketing of that judgment does not and cannot create an act of bankruptcy.

The Court: Well, that alternative section would become meaningless.

Mr. Casey. That's right.

The Court: It would become meaningless.

Mr. Casey: Well, it wouldn't become meaningless.

The Court: It says: “* * * or at least five days before the date set for any sale or other disposition of such property * * *”.

Mr. Casey: We had this in court in the Southern District in the case of Eustace with which I am familiar. That took place 10 or 12 years ago. In other words, where there is an attachment on the 1st of January and six or seven months later there is a judgment and a month or two later a sale under that judgment, the petitioning creditors cannot take the failure to dispose by sale as an act of bankruptcy because they would have to take

the levy of the [11] attachment which was more than four months prior.

The Court: Who decided that?

Mr. Casey: Judge McCormick.

The Court: Did he write an opinion?

Mr. Casey: I think not, but it was affirmed in a comparatively recent case in this Circuit, I think. It is the Northwest Pulp & Paper Co. v. Finish Luth B. Concern in 51 Fed. (2d) 340.

The Court: All right. Let us take a look at it.

Mr. Turbull: I suggest that Mr. Casey's entire argument is based on a set of facts that do not appear here. Nothing appears that he got a lien against certain real property in 1937.

Mr. Casey: You won't deny it, will you?

The Court: Let me take a glance at the record. The date of the judgment does not seem to appear anywhere.

Mr. Casey. Except in the opening paragraph.

The Court: Is it?

Mr. Casey: It simply states when it came on for trial.

The Court: In other words, that does not mean anything, without the jury.

Mr. Casey: Doesn't that indicate it was tried in the February term?

The Court: It says the February term. That's right.

Mr. Casey: Yes.

The Court: 1937. "Hereby commanded to levy * * *". [12] Then we find the certificates.

Mr. Casey: May I ask, How much is the amount?

The Court: Levy, \$3,565.

Mr. Casey: What was the date of that execution?

The Court: It is dated the 8th of September, 1937.

Mr. Turnbull: That is not the execution which was levied in the personal property, however.

The Court: No. Well, we will have to find out. There is more than one writ.

Mr. Turnbull: There are more than one writ in the records.

Mr. Phillips: There are three, your Honor.

The Court: And there are certificates of service, two certificates of service. Then we have a second writ dated 1939.

Mr. Turnbull: That is not the writ, either.

Mr. Casey: That is to make \$245.

Mr. Phillips: That is an accumulation.

The Court: \$245 plus costs.

Mr. Casey: Yes.

Mr. Turnbull: It is the last one there.

The Court: November 19, 1939. And then the alias writ filed June 11, 1941, which is for \$974.17.

Mr. Turnbull: It is my understanding that that is the writ that was levied, that is, the writ the return was made on; and that is the return on which the Judge makes the order [13] approving the sale.

The Court: I see. All right, let us check that. This is dated by the clerk the 5th day of May, 1941, filed June 11, 1941. He makes the return as of

the 6th day of June, 1941. Here is the return: “* * * that I received writ of execution on the 5th day of May, 1941; served the same by delivering a copy to H. Eaves, caretaker, for defendant Stella Dysart * * *”.

That is the 6th day of May. He certifies that he received the writ on the 6th day of May, 1941; that he served the same and took the property into possession.

Well, let me see. He took possession on the 6th day of June, 1941, and makes a certificate as of the 9th day of June. Then he makes an amended return as of the 17th by including certain things at that time. He levied on the casing on three certain wells.

That would be a part of the realty. Casing in a well would ordinarily be a part of the realty. Then follows the notice of execution sale which is dated the 10th day of June. Notice of sale would be had on the 7th of July. Then comes the report of the sale that he sold it on the 7th of July, 1941. We have a bill of sale dated July 7th for the personal property. We have an order approving the sale by the court as of July 12, 1941. Then the sheriff's return shows the notice. And then we have a report of the second sale of the casing in place. The recovery was to be made by the buyer. [14] Then there is a bill of sale on the casing in the three wells which is dated August 14, 1941. That sale is approved as of August 18, 1941.

Now, those are all the dates.

Mr. Casey: My point being, your Honor, that

this judgment became something that had to be taken care of within four months or within 30 days' procurement of the lien. The lien was procured in the February term of 1937.

Now, that having been a lien then, having placed this judgment creditor in a preferential position in reference to the other unsecured creditors of the same class, it then, under the Bankruptcy Act, became the duty of the debtor to take care of that preferential position that Mrs. Christensen was placed in within 30 days of the procurement of the lien; in other words, within 30 days of the February term of 1937. The creditors having passed up that position permitted Mrs. Christensen to procure a lien upon real property, not this personal property thereafter sold, to procure a lien upon real property, which gave her judgment a preferential position. They cannot wait another 30 days or three or four years; and instead of levying upon the land upon which she has the lien, levy upon personal property and notice for sale and then take that sale of that personal property as an act of bankruptcy. In other words, this judgment is a secured claim and is in a preferential position. It cannot be upset by bankruptcy, by virtue of the lien that was [15] procured more than four months prior to bankruptcy, in other words, in 1937.

What they are attempting to do—the Circuit Court mentioned that in its opinion, not in this particular case, in this litigation—that while counsel hadn't pointed out and argued that the New Mexico statute made the judgment in the court and

automatically on real property, it appeared in that case that there was real property; then, therefore, the act of bankruptcy was more than four months subsequent, or, that the petition was more than four months, and the commission of the act of bankruptcy was procurement of the judgment.

The Court: That would be the law of the case if it so held. I probably read it at the time, but it does not stand out in my mind. I agree with you that this decision to which you called my attention does hold that the starting point is the judgment, but the court there was dealing with the law of Oregon on which the judgment became such a lien.

Mr. Casey: The citation of that other decision is 118 Fed. (2d) 482.

The Court: All right. Let us take a look at it. We might as well do it now.

Mr. Turnbull: May I be heard just a moment, your Honor?

The Court: Yes. I was just trying to find out what it is all about. I did not get the point at first.

Mr. Turnbull: Counsel is very inconsistent. He argued in the Circuit Court of Appeals. There were two acts of [16] bankruptcy in this Section Three, subdivision 3. The first act of bankruptcy was the 30-day lien, and he claimed that counsel in that other case, the other bankruptcy case which the Circuit passed on, did not prove that there had been a levy upon personal property which had not been set aside within five days. Therefore, that was a separate act of bankruptcy.

I am responsible for this pleading—I wasn't re-

sponsible for the other pleading—and in the second subdivision of subdivision 3 of Section Three that is the way it is pleaded, that it is the failure to remove that lien by a sale or other disposition of the property within the 5-day period; and when four days runs after that levy, that act ripens; it has nothing to do with the 30-day lien on real property. They might never have levied on personal property, but they did levy on personal property. The judgment entered did not set it aside within the five days or make any other disposition, and it went to sale. That sale then ripened, and if it had run four months it would have been a preference. That is where the Bankruptcy Act says that you have got to take advantage of that sale within the four months.

Mr. Casey: Might I call your Honor's attention that in reading that case there are two footnotes, I think, by the Justice.

In answering Judge Turnbull right now, in the Pulp case the court states distinctly contrary to what Judge Turnbull [17] thinks the law is; and that is:

“* * * If the lien is created by an attachment, which attachment is followed by a judgment lien, it is the date of the attachment lien which creates the acts of bankruptcy * * *”

It is the date of the attachment.

Mr. Turnbull: I concede that that is the law.

Mr. Casey: The date of the judgment lien—

Mr. Turnbull: I concede that is the law.

The Court: Just a minute.

Mr. Casey: “* * * This becomes of vital importance under either the 5 or the 30-day requirement of the Act.”

The Court: You are reading from the—

Mr. Casey: The Northwest Pulp.

The Court: The Northwest Pulp case?

Mr. Casey: Yes.

Mr. Turnbull: Of course, your Honor, when there is an attachment and later an execution levy there is a merger of that lien, there isn't any doubt. But nobody levied on personal property until the alias execution was issued.

Now, a general creditor has no right, no lien on personal property until he levies on it, until he sells it.

Mr. Casey: But this creditor was not a general creditor; it was secured by her judgment lien.

Mr. Turnbull: And the act of that particular creditor didn't start to run, as far as he personally was concerned, until the levy had been made. The four-month period by [18] which it could be taken away from that judgment creditor started to run from then, not from 1937. They didn't have any lien on personal property in 1937. A trustee in bankruptcy couldn't go back and take away personal property from a creditor who didn't have a lien on it. The four-month period runs from the time it starts to become a lien.

Mr. Casey: No. If the judgment creditor in this case satisfies her judgment out of personal

property, the creditors aren't hurt, because then the lien on the real property automatically would be raised. That is why the law is as it is.

The Court: In the Dysart case the court says, after citing Section 3 of the Act:

"There is no evidence that appellant, within four months next preceding the filing of the original petition, the supplemental petition or the amended petition, committed any of the acts which Section 3, subdivision a, declares to be acts of bankruptcy. There is evidence that appellant suffered or permitted a creditor, Mary T. Christensen, to obtain a judgment against her in 1937, and that she suffered or permitted another creditor, E. H. Youngblood, to obtain a judgment against her in 1938; and we assume, without deciding that Christensen and Youngblood thereby obtained liens upon appellant's property * * *".

In the footnote Judge Mathews says:

"Both judgments were obtained in New Mexico. Whether, [19] in New Mexico, a judgment is a lien upon the judgment debtor's property is a question which counsel have not seen fit to discuss."

Then he goes on:

"* * * but there is no evidence that appellant was insolvent when said liens, if any, were obtained. Furthermore, said liens were obtained, if at all, long prior to the commencement of the four months period specified in Section 3, subdivision b."

Therefore, the court assumes that the lien that is spoken of here is the lien of the judgment and not the lien of any execution.

Mr. Casey: Yes.

The Court: (Reading):

"There is evidence that appellant suffered or permitted an execution to be issued on the Christensen judgment on November 21, 1939, and that the execution was levied upon certain of her property on December 13, 1939; and we assume, without deciding, that Christensen thereby obtained a lien upon the property so levied upon * * *".

So, you see, there the court assumes that so far as the property is concerned the lien dated from the levy. And then again they say:

"This question, also, counsel for all parties have chosen to ignore."

That is another one of those cases. [20]

Mr. Turnbull: The point was, your Honor, they didn't prove that it wasn't set aside within the five days. That is the only point involved.

The Court: The only point I am trying to find out is if, under the law, the levy of the execution was the starting point of the lien period or the execution or the entry of the judgment. If the levy were on real property, I would say, assuming the law of New Mexico to be the same as elsewhere, that the docketing of the judgment automatically made it a lien against all the property.

Mr. Turnbull: I concede that is true.

The Court: Now, as to personal property, there is no such law, although there may be a law in New Mexico. So, gentlemen, it occurs to me that you ought not to proceed in darkness; that it is very

easy to prove what the New Mexico law is by getting the New Mexico code.

Mr. Casey: I can give you the citation.

Mr. Turnbull: May I ask counsel, Does he claim that a judgment is an automatic lien on personal property?

Mr. Casey: My answer is "No." But you claim you have a lien the first time you get the lien. That is the basis of an act of bankruptcy. You can't wait two or three years and get another act of bankruptcy by selling personal property. In other words, this judgment became a lien in the February term of 1937, and if the creditors wanted to take advantage of it, they would have to do so within four [21] months of February, 1937.

The Court: Well, this case does not so hold, unless there is another case which so holds. This case, of course, has to go back to the time of the attachment because, with the entry of the judgment, you see, the lien of the attachment is merged into the judgment and thereafter execution issued—

Mr. Casey: Correct.

The Court: —and, you see, some people in California try to take advantage of that rule and claim that therefore the attachment is wiped out.

That attachment has done one thing for you. It has sequestered—that is a good word that we don't use enough—the property to abide by the judgment.

Mr. Casey: Yes.

The Court: Then when your judgment came automatically the property you have sequestered

would stand you in good stead. Otherwise the creditor who had a last judgment could defeat your prior attachment; and that was actually attempted in California.

Now, when you talk California law I am on my own ground. When you talk New Mexico law I don't know what it is all about.

Mr. Casey: In 1937 the real property of Mrs. Dysart was sequestered by the judgment lien.

The Court: No. Sequestration may be of separate pieces of property. Under your theory automatically when her [22] judgment was secured it became a lien upon real property.

Mr. Casey: Yes.

The Court: All right. But if it did not become a lien on her personal property, the mere fact that the lien was impressed on her real property would not destroy or would not be the starting point for the rights as to a lien on personal property which could not arise until levy later on.

Mr. Casey: I agree with you there. But you have to go a step further. The Bankruptcy Act does not provide nor do the decisions permit one who has had a lien upon real property thereafter and more than four months beyond the procurement of that lien on real property to seek another act of bankruptcy by having some personal property put up for sale and saying, under Section Three, subsection 3, "Why, you haven't vacated the sale."

The Court: If they levied on real property, they have exhausted their right.

Mr. Casey: That's it. The Pulp case states, I think, probably a little further down:

"This date," that is, the date of the procurement of the first lien, "whereby attachment, judgment or execution * * *"

The Court: Where are you reading from?

Mr. Casey: I can't recall. "This date becomes of vital importance * * *"

The Court: Wait a minute. Let's find it.

Mr. Casey: In other words, the date of the procurement [23] of the lien for the first time becomes of vital importance, either for the 5-day vacation of sale or the 30-day requirement of the Act. The majority of courts have held that the petition must be filed within four months after the creation of the lien for the first time.

Mr. Phillips: That is, assuming that there is no further act of bankruptcy.

Mr. Casey: I am talking about one act of bankruptcy.

Mr. Phillips: Well, we are talking about something else.

The Court: The Northwest Pulp case says this, after citing the subdivision, and this is Judge Sawtelle:

"The use of the conjunction 'and' instead of the disjunctive particle 'or' indicates that both elements must concur to constitute an act of bankruptcy * * * And both must concur within the four-month period prior to the filing of the petition in bankruptcy. If the lien is obtained before the deter-

mining period has commenced to run, and enforcement proceedings are instituted within the four-months' term, a complete act of bankruptcy has not been committed.

"That both judgments in this case created valid liens at the time the judgments were docketed is admitted by the appellee in its amended petition. Provision for the obtaining of such liens is contained in the Oregon statute * * *

"It next becomes necessary to inquire whether merely permitting, while the debtor is insolvent, a judgment creditor to enforce, within the four-month period preceding [24] the filing of the petition, a valid lien docketed many months in the past, constitutes an act of bankruptcy. * * *"

And they say "No."

Mr. Casey: That is my position.

The Court: Yes. But they presuppose a valid lien created by the judgment.

Mr. Casey: We have presupposed by this judgment a valid lien upon real property.

The Court: In other words, whether they actually levied or not; is that your idea?

Mr. Casey: Yes.

Mr. Turnbull: But that is not the act of bankruptcy we are relying on.

The Court: That's right.

Mr. Turnbull: You cannot compel us to make our act of bankruptcy. We didn't create the act of bankruptcy.

Mr. Casey: I claim that that act of the sale of

personal property, instead of selling the real property, is not an act of bankruptcy.

The Court: Well, let us look at this.

Mr. Casey: In other words, Mrs. Christensen could have sold the real property and procured the money. Instead of doing that she levied on personal property. She can't do that as an act of bankruptcy.

The Court: She can do it to get the money. This case does not sustain your contention that the five days is in [25] addition to the 30 days. This case clearly holds that the five days is a part of the 30 days.

Judge Sawtelle says specifically that that is the point that is being decided, and the 5-day period is not a separate period or a separate fact or a portion of the 30-day period. You see, he said:

"The controlling question presented in this case is whether or not an act of bankruptcy is committed by an insolvent debtor's failure to vacate a judgment that gave rise to a lien at a date prior to the commencement of the 4-month period, within at least five days before the date of sale or other disposition of property affected by the judgment, said sale taking place within the four-month period. * * *"

Mr. Turnbull: That is a prior lien, however, your Honor. If you test the reason for the rule, it is this: Of course a sale—

The Court: If that were the case, then this is what might happen: A lot of these problems arise

in the light of conditions. You always have to test what would result. Here is a man who has a judgment, who has a judgment that may even be outlawed by the statute of limitations. He can run an attachment five years after the failure to discharge the attachment. Assuming that the man, the person who has been insolvent for all those years, would recreate each time he did that his lien. —assuming the law of New Mexico to be [26] the same as that of California—even though the statute of limitations has run against the judgment, you can still obtain an execution, so that you could, every time that you levied on property that the debtor had fully acquired and if he failed to discharge, bring him into court charging an act of bankruptcy.

Mr. Turnbull: May I suggest, your Honor, that the conduct that counsel complains of is not the conduct of the petitioning creditors.

The Court: I understand that.

Mr. Turnbull: The test in bankruptcy is: Is this personal property going to be removed from the assets of the alleged bankrupt? It isn't removed from the assets of the alleged bankrupt until a certain time; and a trustee in bankruptcy on behalf of the other creditors who don't get it within the four-months period can get it thrown back into the general pot. He can't do that as long as it remains the property of the bankrupt because it is part of the bankrupt's assets. The test

in bankruptcy, therefore, is: Is the estate of the bankrupt, are the assets diminished by that act?

That is what makes it an act of bankruptcy.

Now, until such time as they levy upon the personal property of the debtor, it is her property. Nobody has taken it away from her. Nobody has got a lien on it. She may be solvent as long as she has it. [27]

Now comes along a creditor and maybe he has extended credit. He comes up to her—I am trying to answer your Honor from a practical standpoint—and he does not take her personal property away from her up to a certain time—she may be solvent; she may be insolvent—but at a certain time he does take it away from her by a sale; and the estate of that bankrupt is diminished by the value of that property which is taken away from her and the four-months period in which the creditors might throw it into the general pot starts to run then.

From the practical standpoint, your Honor, and from an administrative standpoint of the application of bankruptcy law it would be ridiculous to say that because they didn't take it away from her the four-months period started to run. The estate of that bankrupt is diminished when they take it, but not until they do take it. Any creditor could levy against that personal property.

The Court: Too much of our difficulty with bankruptcy law lies from the fact we forget the law of the state where we sit. I had occasion to call attention recently to two cases where, if the

referees and counsel before them had forgotten the general principles of bankruptcy and looked to the Civil Code, they would discover a solution to their problem contrary to the way the decision went. Nobody thought about it.

Ultimately here we have got to determine this: Is a [28] lien created? If the lien is created by the judgment, then, of course, the mere fact that levies are *seriatim* wouldn't extend your lien. That is what this case says.

Mr. Turnbull: I agree with your Honor. But how can a man have a lien on personal property which he does not levy or take into possession? That is not the law of this state. Forget the law of bankruptcy. It does not diminish the estate of the bankrupt until it is levied or taken upon. That is the reason for the rule. That is why the Bankruptcy Act has been amended several times.

Mr. Casey: Let me correct Mr. Turnbull. He says that the debtor's estate is diminished. Now, if Mrs. Christensen has a \$1,283 lien upon \$10,000 worth of property and this debtor went into bankruptcy, the bankruptcy court would take that property subject to the \$1,283. But instead of taking the \$1,283 on the real property, if that judgment creditor takes \$1,283 out of the personal property, the bankrupt estate is not diminished. The trustee in bankruptcy would take over the estate in exactly the same position as it would the assets as though she had levied upon the real property and got her \$1,283.

Mr. Turnbull: Again counsel assumes that there is real property that he got a lien on worth that amount of money.

Mr. Casey: The Court has decided that.

The Court: Let us see the section.

“* * * suffered or permitted, while insolvent, any [29] creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property * * *”

Now, Judge Sawtelle said this:

“If the lien is obtained before the determining period has commenced to run, and enforcement proceedings are instituted within the four-months' term, a complete act of bankruptcy has not been committed.”

In other words, the enforcement proceedings do not extend the period of the lien of the judgment in that particular case.

Gentlemen, I shall declare a short recess. I want to find that case, that Washington case.

Mr. Casey: May I cite, for the purpose of the record, the New Mexico statutes?

The Court: I have no way of getting them.

Mr. Casey: Chapter 76, section 110, provides that the judgment in the county clerk creates a lien on all real property in that county.

The Court: I assume that is the law.

Mr. Turnbull: I understand that counsel does

not contend there is any law of New Mexico that makes a lien on personal property.

The Court: Unless that lien on personal property gives [30] it the character that you cannot afterwards start any execution on personal property and be within the four-months period. In other words, he says if the judgment gives you a lien on real property that your four-months period is determined from the date of the lien whether they actually levy or not. Is that correct?

Mr. Casey: That is correct.

Mr. Turnbull: Without any levy on personal property.

The Court: Without any levy on personal property. I am not agreeing with them. I am just stating the proposition.

Mr. Turnbull: Of course, if that is so, a person who extends credit to a debtor doesn't do the other creditors a favor at all. He creates a lien in his own favor.

The Court: Well, that may be true.

Mr. Turnbull: That is not the law.

The Court: That may be true, but it may result in a great injustice. I ran across a problem the other day. I decided it to the best of my ability. I may be right and I may be wrong, although I am not apologizing for it. It shows in determining bankruptcy we have to bear in mind the state law and what business conditions are. The question before me was whether the bulk sale act applied to a chain bakery which abandoned four

profitable branches and sold the stock and the fixtures when the value was an infinitesimal part of the value of the assets. The assets of the company showed some \$78,000. According to appraisal of the goods I found [31] the fixtures were worth about \$600 altogether. There was no evidence of fraud. I held that the Legislature specifically used the definite article "the." It didn't say "any fixtures." It says "the fixtures of a baker." It didn't say, as it did in the bulk sales part, "substantial fixtures." There was no law one way or the other.

I was governed chiefly by this proposition: that it would be absolutely unfair in the modern day of the chain store to subject a concern which has 30, 40, or as many as 500, as Safeway has, to the penalty of having its act characterized fraudulent for failure to file a certificate every time it sells fifty dollars worth of fixtures in a place that has proved unprofitable. We have got to consider the consequences from both sides.

I can see the validity of your argument, but I can also see that the argument would mean that so long as a person during his lifetime should come in possession of personal property you could call him into bankruptcy, even at the time that the judgment has been outlawed.

Mr. Phillips: If your Honor please, would it not be possible for a judgment debtor, if he so desired and was so constituted, to defeat the Bankruptcy Act by going to the sticks some place and permitting a judgment lien to go against him and

then move to Los Angeles and acquire personal property, committing several acts of bankruptcy and thereby defraud his creditors? [32]

The Court: You cannot follow him out of the state, anyway, as far as his personal property is concerned.

Mr. Phillips: I mean in the state, if he goes to the sticks in some other county. We say that if the reasoning of Mr. Casey is correct that it would defeat the very purpose of the Act, Section Three, subsection 3.

The Court: All right. I will see about it. We will take a short recess. I want to find that case.

(Short recess.)

The Court: Gentlemen, I have run through the cases, and I have reached the conclusion that subdivision 3 of Section Three of the Bankruptcy Act of 1938, as it is interpreted by the courts, deals with liens obtained upon any property through legal proceedings.

In reading the history of the Section, I find that the amendment of 1926 aimed to overcome a decision of the Supreme Court which permitted a creditor to obtain a lien and then, regardless of any time limit, take his time within which to enforce the right he obtained; and the object of the section is to cut off that right so that regardless of the time when the lien was obtained, his rights had to be asserted within the period in order to acquire any rights in preference to other creditors.

I followed Mr. Turnbull's suggestion to start

from textbooks, although it isn't my method of working. I work from digests. The average textbook is merely a summary of the [33] rulings and, oftentimes unless the man is a legal philosopher like Wigmore or some of the other men, the work is not even done by the man whose name the book bears but by some amanuensis, or it is merely a summary or his interpretation of the statute. Too often I have been misled by following the interpretation which a person placed upon the statute.

I found recently an illustration in tax law where a tax writer who had a special axe to grind because he happened to be also a Treasury official, placed a certain interpretation upon community property rights which, of course, the Treasury Department never has liked. I decline to follow him but follow my own interpretation of what the California law is with reference to it.

However, the textbook statement is a good starting point at times. So we start with 150.70 of Remington interpreting the particular section, and we find the point investigated:

“* * * that the mere obtaining of a judgment that does not create a lien is not enough. ‘Judgment’ means judgment lien.”

I find a large number of cases including some in our own circuit dating way back which so interpret the section. We have, for instance, in our own circuit the case of *In re Beaver Coal Co.*, 113 Federal Reporter 888, decided way back in 1902 which, interpreting the provisions, similar provi-

sions which are contained in the Act as it then stood, says that [34] similar provisions contemplate liens whether they are obtained by the judgment or by the attachment. In that case Judge Gilbert was talking about the law of Oregon, and he said, and I quote from 891, 113 Federal:

"By the law of Oregon, the lien of an attachment upon personal property is enforced by a provision in the judgment entry directing the sale of the attached property. The judgment order so made does not create a new lien nor discharge the old. It directs only the enforcement of the lien. It is similar in its nature to a decree for the foreclosure of a mortgage. It sustains the attachment lien, and subjects the attached property to its satisfaction. Construing the language above quoted from section 67f, we think it refers solely to liens, and that it does not mean that all judgments rendered within four months prior to bankruptcy shall be null and void. The use of the words 'judgments * * * or liens' indicates that it was the purpose of the act to avoid liens only which were obtained by judicial proceedings within the prescribed time, and not to declare void judgments as such."

Then he refers to the fact that there are some decisions to the contrary; but he declined to follow them.

Another older case I find is *Colston v. Austin Run Mining Company* from the Third Circuit. The opinion in that case by the Circuit is rather short. It was at the time when appellate courts occasionally

pay to the District Judge [35] the compliment of adopting his opinion, which they did in this particular case.

Mr. Casey: Will you give the citation, your Honor?

The Court: This is 194 Federal, 929, decided 1912 by Gray, Buffington and Young.

I read from page 935:

"The question is thus presented, as stated by the court below, whether an attempted enforcement while insolvent within the space of four months next before the filing of a petition in involuntary bankruptcy, of a lien on the property of the alleged bankrupt validly created and substituting for more than that period, coupled with an omission by him to secure, at least five days before a sale or final disposition of such property, the vacation or discharge of such lien, constitutes an act of bankruptcy under section 3a of the Bankruptcy Act. There has been some conflict in the decisions upon this question, but we agree with the learned Judge of the court below that both reason and the weight of authority compel the conclusion that mere failure, while insolvent, to vacate or discharge the lien within the statutory period of four months, and at least five days before a sale or final disposition of the property affected, does not constitute an act of bankruptcy. Priority is obtained when a lien attaches, and not when it is enforced. The date of the sale is immaterial in this respect; whenever it takes place, it relates back to the date

when the lien [36] attached. The attaching creditor in the case before us, therefore, did not obtain a preference by the decree liquidating his debt. * * *,

Then they cite from Metcalf v. Barker and refer for further authorities to the District Court case.

Now we come down to later dates. I have one here. Here is one from the Sixth Circuit, Hawthorne Valley, Inc., v. Arthur J. Adams, 1934, 69 Fed. (2d) 691, 25 American Bankruptcy Reports, New Series, 176. For some reason or other the reference was to this rather than to the official reports; so I brought it here. The court cites there from Citizens' Banking Co. v. Ravenna National Bank:

"Looking at the terms of this provision, it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of the judgment, attachment, execution, or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insol-

veney alone does not [37] suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision. All this is freely conceded by counsel for the petitioning creditor."

The court then refers to the Ninth Circuit opinion in Northwestern Pulp & Paper Company v. Finnish Luth Book Concern for an analysis of this provision. Then it goes on to say:

"According to the petition the preference consisted of the levy of the fieri facias on March 2, 1932 * * * But this levy, of March 2, was made more than four months before the petition was filed and we think therefore that there was a failure to aver an act of bankruptcy because the province which was a constituent element of the act was not 'suffered or permitted' within that period."

I am omitting a portion, reading from the last paragraph of page 179:

"We think this interpretation of section 3(a) (3), 11 U.S.C.A. section 21(a) (3) is correct, because, while clause 3 does not in specific terms require that the preference, which the debtor may discharge at least five days before a sale or other disposition of the property affected, shall be attained within four months before the petition is filed, yet a contrary holding would lead to a situation which we think was never contemplated. Owen v. Brown * * *" [38]

I stop here for a moment. This court says clearly that a five-day period is not an alternative, is not in addition to the thirty days. Then it goes on, continuing:

"The security of all preferences obtained through legal proceedings at any time how ever long before the four months' period would be endangered and such a result would be inconsistent with section 67f * * * as construed in Metcalf v. Barker * * *"

Then they quote from Metcalf v. Barker.

Coming down to later cases there is one here where I am going to read the District Court case first and then the opinion of the Circuit to show that there is at least one Circuit which holds that if the judgment created a lien on real property, unless there is a showing that there was no real property at the time or he never owned it, a subsequent levy on personal property is absolutely ineffective because the law contemplates not the actual enforcement of the lien but the existence and creation, automatic creation, of the lien by the State law. That is why this section says:

" * * * suffered or permitted while insolvent to obtain a lien upon any of his property * * *"

He didn't say upon "his property," but "any of his property." And if automatically, if it can be shown that there was real property at the time of the judgment to which the lien attached, then regardless of whether any levy was actually carried, the four-months period begins to run from [39] that time.

Incidentally, Mr. Remington thinks it of such importance that he gives it practically half of the opinion on page 242 of the text following the reading of the statement I have just read. He refers, however, only to the District Court's opinion which probably was all he had at the time the original text was written, although in the supplement he refers to the opinion in the Circuit which reaffirmed the principle.

This is a motion to dismiss a petition on the ground it failed to show an act of bankruptcy.

Mr. Casey: Let me have that citation, your Honor.

The Court: This is 25 Fed. (2d) 773. It is the District Court of Pennsylvania and, of course, that was the time when the Federal Supplement was not in existence and District Court cases appeared also in Federal (2d) which they don't now. Reading at page 774:

"The petition avers in substance that the alleged bankrupt, while insolvent and within four months next preceding the filing of the petition, permitted a judgment to be entered against him, which judgment has not been vacated, discharged, or satisfied, and that more than 30 days have elapsed since the entry of the judgment. It is contended that this is not sufficient, because there is no allegation that the judgment is a lien on any property of the bankrupt. The point for decision is whether the word [40] 'judgment' in the statute means only a judgment which is a lien upon the property of the alleged

bankrupt, or means any judgment, whether a lien or not.

"The statute specifies 'any levy, attachment, judgment, or other lien.' 11 U.S.C.A. section 21(a) (4). Many judgments (as in a case where the defendant owns no real estate, but personal property only) are not liens. There is thus an ambiguity, and it is proper to consider the history and purpose of the legislation in order to determine its true intent * * *"

Then it goes on and analyzes the Ravenna case to which I have already referred. He speaks of the history of the 1926 amendment and quotes the Senate Judiciary Committee saying the object of the bill was this:

"The amendment is for the purpose of preventing a creditor from obtaining a lien and holding it without proceeding to a sale under it until it ripened into a preference." Clearly, the attention of the Congress was turned only to judgments which were liens. Legislation directed toward judgments which were not liens would have been superfluous. Under the law as it stood before the amendment, no advantage could have been obtained prior to levy by the creditor holding such a judgment, and after levy and upon proceeding to a sale the provision for the third act of bankruptcy struck down the preference.

"The context in which the word appears, and the [41] limitations implied in the phrase 'or other liens,' call for the application of the rule of noscitur

a sociis * * * The plain intent of the congress, as well as the association of the word in the act itself, 'justifies, if it does not imperatively require,' the conclusion that the judgment meant is a judgment which creates a lien.

"If the judgment referred to in the petition is a lien, and so within the meaning of the statute thus construed, the petitioners should be permitted to so aver. Ten days will be allowed for amendment, and in default of such amendment the petition will be dismissed."

They did not file an amendment, and the petition was dismissed and the case went to the Circuit.

Reading from Weitzel Flooring Corporation v. Getz, an opinion from the Third Circuit, 1929, 31 Fed. (2d) 930 before Buffington, Wooley and Davis, at page 931:

"The facts are not fully set out in the record, but, as we understand them, the arguments and opinion below are predicated upon the assumption that the judgment pleaded was not a lien on the property of the bankrupt. The appellants contend that it makes no difference whether or not it was a lien. It was a 'judgment' against him and comes within the terms of the act * * *"

Then they go on to hold as other courts have held that the aim is not a judgment but judgments which create a lien or any other proceedings which create a lien, and that is the [42] important thing and not whether any process is used in enforcing the lien. Giving the meaning of the section, the court says:

"Before the amendment of 1926 a creditor might obtain a lien against a person, and not proceed under it for four months, when it would ripen into a legal preference. Another creditor in many cases was powerless to prevent this, for before this amendment an insolvent debtor did not commit an act of bankruptcy, rendering him subject to involuntary adjudication, by mere inaction for a period of four months after levy of an execution upon his real estate * * *"

Citing *Citizens Banking Company v. Ravenna National Bank.*

"This amendment was intended to prevent this. The report of the Senate judiciary committee states with reference to this new act of bankruptcy that: 'The amendment is for the purpose of preventing a creditor from obtaining a lien and holding it without proceeding to a sale under it until ripened into a preference.' This amendment enabled any other creditor, after 30 days from the entry of the judgment, to file a petition in bankruptcy against the debtor, and thus prevent the judgment from becoming a legal preference, which, however, could result only if the bankrupt had real estate upon which the judgment would become a lien. The word 'other,' used in defining the fourth act of bankruptcy, in connection with the words 'levy, attachment, judgment, or other lien,' implies that the Congress had in [43] mind, when it used the word 'judgment,' such a judgment as would become a lien on real estate, and so a legal preference, unless vacated or discharged within 4 months * * *

"The appellants, however, raise the question in their paper book * * *"

I don't know what that is. Some of these phrases are funny. They must mean something in making up the record.

"The appellants, however, raise the question in their paper book that, since this is a motion to dismiss the petition in bankruptcy, the court cannot dismiss without a finding as a fact that the appellee did not have any real estate upon which the judgment would operate as a lien, and say that 'there were no depositions taken, and therefore no basis on which the court might find as a fact that the debtor did not own any real estate.'

"As above stated, it was our understanding at the argument that the debtor does not have any real estate. The case proceeded on this theory in the court below, and the opinion of the learned District Judge was predicated upon this assumption. However, he gave the appellant an opportunity to allege and establish that the debtor did have real estate at the time the judgment was entered. At the conclusion of his opinion, he said: 'If the facts in this case are really within the meaning of the statute thus construed, the petitioners should be permitted to so aver. Ten days will be allowed for amendment, and in default of such amendment, [44] the petition will be dismissed.' They did not amend their petition and allege that he had real estate, but appealed and argued the case here without making such allegation.

"If, however, the District Court was in error in its assumption, and the argument before that court and this court was based upon an assumption contrary to facts, a re-argument should be had upon definite allegations as to the real fact, so that the opinion of this court as well as that of the District Court may be corrected, and not based upon a non-existing fact. But if we and the District Judge correctly understand the fact, that the alleged bankrupt does not have any real estate, further proceedings based upon vague intimations that he may have, would be improper practice.

"The decree of the District Court is affirmed."

The petition there alleged that Getz while insolvent suffered a judgment to be entered against him for failure to file an affidavit of defense to a statement of claims served upon him by Weitzel Flooring Corporation "wherein it was set forth in its claim against the said Max F. Getz for \$2,500 with interest due on two promissory notes in the sum of \$800 and \$1,700 respectively. (The) judgment was entered as of common pleas * * * (The) judgment has not been vacated, discharged, or satisfied, and more than thirty days have elapsed since the entry of (the) judgment."

The court held that as the debtor did not have any real property, the judgment did not constitute a lien; and none [45] having been acquired through attachment, no act of bankruptcy had been committed.

As we get closer to more recent cases we find more

general declarations to the same effect. I have a case here from the Second Circuit decided in 1932, Elkay Reflector Corporation v. Savory, Inc. In that case the creditor had begun an action in the Supreme Court of New York to recover some \$20,000. An attachment was issued in the action, and on December 5, 1930, the sheriff of Kings County took possession of the personal property of the defendant in that county. Judgment was obtained in April, 1931. The question arose whether an act of bankruptcy had been committed. The court said this:

"A new act of bankruptcy was created under section 3a (4) of the Bankruptcy Act, as amended May 27, 1926 * * *"

And that is the present subdivision 3.

"* * * in addition to the former subdivision 3 of section 3a of the Bankruptcy Act. That subdivision defined one of the acts of bankruptcy as having 'suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference.' Under it a creditor could obtain a judgment within four months prior to the filing of the petition which became a lien against the bankrupt's real property or through issuance of an execution [46] became a lien against his personal property, and thereafter realize a preference through a sale had after the petition was filed. In other words, by mere failure to enforce a lien during the four months' period,

the creditor could obtain a preference through legal proceedings * * *”

Again citing *Citizens' Banking Company v. Ravenna Bank.*

“The purpose of the amendment was to obviate the necessity of a sale or final disposition of property during the four months' period in order to constitute an act of bankruptcy. In other words, suffering a creditor to obtain a lien during the four months' period, through an attachment or judgment, was made an act of bankruptcy by the amendment. A provisional attachment levied prior to the four months' period ripens, after judgment, into an unassailable lien no matter when judgment takes effect * * *”

Mr. Phillips: What is that citation, your Honor?

The Court: What is that?

Mr. Phillips: Would you give us the citation?

The Court: 57 Fed. (2d) 161, Second Circuit. It cites *Metcalf v. Barker*, *Gatell v. Millian*, *Lumet and Co. v. Delgado* and *In re Blair*. Then continuing:

“It is not reasonable to suppose that a preference which cannot be set aside is made an act of bankruptcy and a preference so obtained was held by the Court of Appeals of the Third Circuit not to constitute an act of bankruptcy, *Colston v. Austin Run Mining Company*,” the case which I read [47] before.

“* * * such also was the decision by Judge Burns in the District Court in *Julius S. Cohn and Co. v.*

Drennan * * * Where property has been attached by mesne process, the lien dates from the original levy irrespective of when the judgment is recovered. * * *

"In the case at bar the judgment and the execution issued in pursuance of it merely enforced the lien of the attachment obtained prior to the four months' period. The amendment of 1926 therefore does not cover the case. It was only intended to render a lien acquired by judgment sufficient as an act of bankruptcy and not to require a final disposition of property of the bankrupt by sale. It cannot be presumed to affect a lien created by an attachment prior to the four months' period.

"It is contended that under the words of the amendment a 'judgment' within the four months' period is alone sufficient, but it seems plain that for a judgment to come within the spirit and meaning of the act it must be a judgment that has become a lien and as such a legal preference * * *"

Then they refer to the Getz case, which I have already read, and say:

"As the lien here, read in connection with the warrant of attachment, antedated the four months' period, there was no act of bankruptcy * * *" [48]

I think this is the last one, gentlemen. I did some fast work there. This is another Second Circuit case, 1937. There are some later cases than this. I have some District cases later than that, but I think these are enough.

This is In re Flushing-Queensboro Laundry, 90

Fed. (2d) 601, 1937. It involves a judgment of the Municipal Court; and the question before the court was whether the judgment created a lien. In doing so Judge Chase stated the conditions and the exceptions, and he followed the other cases to which I have referred. I am going to read the language because it shows clearly that if the evidence shows that if at any time through the lien of a judgment a lien was created, that then any subsequent levies are ineffective unless it be shown that there was no lien, either by showing that the judgment did not have that effect or by showing that the kind of property to which the lien of the judgment automatically attached did not exist.

"The proof as to the other alleged act of bankruptcy was also insufficient. The judgment relied on below was entered and docketed in the Municipal Court of the City of New York, Borough of Manhattan, Fifth District, on the 25th day of September, 1935, for the sum of \$125.73. Execution was issued and delivered to a marshal who returned it unsatisfied. It was not docketed in the office of the county clerk as was necessary to create a lien on real property (citing cases). Had there been any personal property of the judgment [49] debtor, what was done might have created a lien against that, section 679 of the New York Civil Practice Act, but, in the absence of proof of such property, since the alleged fraudulent transfer * * * was not shown, there was no lien for there was nothing to which a lien could attach. Merely the suffering of

such a judgment as was entered and its nondischarge within thirty days was not an act of bankruptcy. To be that under section 3a (4) of the Bankruptcy Act, as amended, 11 U.S.A.C. 21(a) (4), a lien must be created. It is the failure to discharge a lien obtained through legal proceedings and thus do away with its possible adverse effect upon other creditors which has been made an act of bankruptcy * * *

They cite the *Elkay Reflector Corporation against Savory*, which I have also read.

I think the decision of the Ninth Circuit in the case before us really intimates the same situation: that if at any time a lien was actually obtained by the judgment against any of the property, that exhausts the power of the section and thereafter you cannot start the four months' period running by levying on property which may make its appearance after the judgment, and that the only way to avoid the effect of the lien of the judgment is to show that at the time it was levied there was no property to which it attached.

Now, for instance, Judge Mathews says: "There is evidence that appellant suffered or permitted a creditor, [50] Mary T. Christensen, to obtain a judgment against her in 1937, and that she suffered or permitted another creditor, E. H. Youngblood, to obtain a judgment against her in 1938; and we assume, without deciding, that Christensen and Youngblood thereby obtained liens upon appellant's property; but there is no evidence that appellant

was insolvent when said liens, if any, were obtained * * *

Again they say that counsel have not discussed the proposition whether a judgment is a lien upon the debtor's property. Then they go on again:

"There is evidence that appellant suffered or permitted an execution to be issued on the Christensen judgment on November 21, 1939, and that the execution was levied upon certain of her property on December 13, 1939; and we assume, without deciding, that Christensen thereby obtained a lien upon the property so levied upon; but there is no evidence that the lien was not vacated or discharged * * *"

In other words, the court assumed, in the absence of any argument, that under the law of New Mexico a judgment was a lien upon certain defined property and proceeded to declare that even so assuming there was no showing that it was not vacated within the period of time provided by the statutory definition which I have read.

Now, there is no evidence here one way or the other, Mr. Casey.

Mr. Turnbull: May I suggest that we stipulate the [51] effect of the New Mexico statute to the effect that under the laws of New Mexico as they existed at the time the Christensen judgment was entered and at all times since that the same becomes automatically a lien upon the real estate of the judgment debtor in the county in which the judgment is rendered. Counsel offered the citation a few minutes ago, and I agree with him.

Mr. Casey: Yes, I understand that is the statute.

Mr. Turnbull: Have you the citation of the statute?

The Court: He gave it to me.

Mr. Turnbull: I think we should have it in the record.

The Court: I think he gave me New Mexico statutes, Chapter 76, section 110.

Mr. Turnbull: Whether or not that is the statute, if counsel says it is we will take his professional word for it.

We do have a stipulation, now, your Honor, of the effect of the law in New Mexico.

The Court: What, if any, stipulation can you arrive at as to whether on the date of judgment the respondent here had real property in the county in which the judgment in either of those cases was entered?

Mr. Turnbull: I think I can answer it this way: I have here, and subject to your Honor's ruling——

The Court: I merely told you what I have found. I am not making a ruling.

Mr. Turnbull: I understand. [52]

The Court: I felt perhaps my thought would assist.

Mr. Turnbull: I have here a certified copy showing that there was real property in the State of New Mexico that was sold under the Youngblood judgment; and it appears that the real property did exist in the name of Mrs. Dysart at the time we claim our act of bankruptcy existed. In other

words, I am going to meet the issue squarely on the question of the ownership of real property. But I want to show it by legal proceedings.

The Court: Yes. That's all right.

Mr. Turnbull: Now, I will answer that by submitting to counsel an exemplified copy of the record in the case of *Youngblood v. Dysart* and state to the court that the same consists of an exemplified copy of the record showing that a judgment creditor of the alleged bankrupt Dysart obtained a judgment in New Mexico and sold real estate to Mrs. Dysart at a time when it appears that the Christensen judgment existed.

The Court: And the Christensen judgment is the same judgment, and the failure to discharge you allege as an act of bankruptcy?

Mr. Turnbull: Yes. The Christensen judgment referred to by me now and in my previous stipulations refers to the Christensen judgment which is pleaded as two different acts of bankruptcy in the petitions, intervening and original, and which is the subject matter of the exemplified copy that I [53] have offered in evidence. Its admission is now before the court and a ruling not yet made.

The Court: Incidentally, gentlemen, the case I referred to in the Ninth Circuit in which they hold that the penalty of the statute attaches, regardless of the ultimate result in the case, is *Weibrenner, Inc., v. Finne*, 105 Fed. (2d) 272. That is our own circuit. In that case Judge McColloch of the District of Oregon had held that because the debtor

had beaten the lawsuit that the attaching creditor did not have a valid attachment.

Mr. Turnbull: That related to real property, of course.

The Court: Which?

Mr. Turnbull: That levy in that case.

The Court: No. I merely point to that to indicate the strictness with which they enforce the section.

Mr. Turnbull: Before your Honor rules on the matter, and in answer to the question on real estate, so the question will be fairly before this court I offer in evidence the exemplified copy of the record duly exemplified by the clerk of the court, by the Judge and by the clerk of the court that the Judge is the Judge, out of the District Court of the State of New Mexico, First Judicial District, in and for the County of McKinley, McKinley County being the same county in which the Christensen judgment is rendered, your Honor; E. H. Youngblood, plaintiff, vs. S. Dysart—and I offer to stipulate the S. Dysart is the same Stella Dysart [54] herein—

Mr. Casey: Yes.

Mr. Turnbull: —showing the existence of real property in New Mexico in the name of Stella Dysart, showing a mechanic's lien thereon and a sale, execution sale, an order approving the sale as made by the District Judge.

I offer that in evidence for the purpose of showing that there was real estate.

Mr. Casey: The only objection I have there is

that in one of these petitions this is cited as an act of bankruptcy.

If this is introduced, it might possibly be used to substantiate that. I am objecting to that alleged act of bankruptcy. First, it is not a lien procured by legal proceedings as a mechanic's lien.

Mr. Turnbull: I agree it does not constitute an act of bankruptcy and it is not offered for that purpose. The petitioning creditors at this time will not rely upon the Youngblood proceeding.

The Court: The courts seem to be agreed on one proposition when they talk about "liens." They mean liens obtained by legal proceedings.

Mr. Casey: Yes, sir.

The Court: There is an opinion by Judge St. Sure of the Northern District of California, that even a tax lien is not the type of lien which the law contemplates.

Mr. Turnbull: I agree with you. But we claim a levy of [55] a quit of execution on personal property is a lien, your Honor. Now, at this time I have answered counsel on the use of this document, your Honor.

Mr. Casey: Well, I haven't even addressed the court without your interrupting.

Mr. Turnbull: I apologize, Mr. Casey.

Mr. Casey: He asked me to stipulate to that. The reason I can't stipulate to this going in, and the reason I do have objection to it is partially, as I have said—and in addition to what your Honor wishes a stipulation to—as to whether or not the

debtor had any real property standing in her name in McKinley County of the date of the docketing of this judgment in 1937 or prior to the alleged act of bankruptcy in these proceedings. I will stipulate that Stella Dysart, alleged bankrupt, did own real property in McKinley County, State of New Mexico, at the date of the docketing of this judgment in the case of Christensen v. Dysart in 1937.

Now, this document contains several other things that are set forth with a great deal of particularity in the pleadings. That is why I don't want this in evidence.

If it is possible to confine the introduction of this document for the sole purpose of showing that Mrs. Dysart, the respondent here, owned certain described property—well, it states here:

“* * * that the plaintiff is entitled to foreclosure of [56] aforesaid lien and that defendant shall pay the amounts found due,” and so forth, “that the aforesaid Section 14, Township 14 north, Range 10, or as much thereof as may be necessary * * *”

Now, I see the nigger in the woodpile there, your Honor, why this is offered. Counsel—at least Mr. Phillips—knows there is an ulterior motive in that “Section 14 in Township 14.”

Now, if you will have the whole stipulation that they owned real property, that they owned real property in that section in that county at that time, that is all that is necessary. Or if he will limit the use of this document for the sole purpose and none other of showing that the respondent, Stella Dysart,

at the date of the docketing of this judgment, to-wit, the February term, 1937—I think it was March 22, 1937, the judgment was actually docketed with the County Clerk—that she owned real property, that would be all right. But to burden the record with a 15 or 16-page document, whatever this is, concerning matters that are foreign to it I think is unnecessarily encumbering the record. I can give counsel a deed dated in 1935.

The Court: I think, for the purpose of the ruling, all we need is just that stipulation.

Mr. Turnbull: If your Honor please, I did not ask counsel for a stipulation. I suggested in view of what your Honor has indicated that the record should show whether she [57] did or did not own real property; and I could make this offer and at this time I am offering this exemplified copy of this record. It is admissible for several grounds. It is admissible on one ground to show insolvency, to show the piece of real property she had was sold by another judgment creditor. There is no joker in it; there is no nigger in the woodpile here at all. It is a plain exemplified record of the court and the conduct of the judicial and executive offices thereunder. It shows the real property was sold. I am perfectly willing to stand on that record so certified by the clerk and the Judge of the court.

The Court: Let us withhold ruling on that at the present time. You have the stipulation, and I will overrule the objection to the document which you identified. But we ought to wait so that the

record would show first my ruling on the exemplified group of papers.

Mr. Turnbull: Shouldn't your Honor have before you the record on whether there was or was not real estate?

The Court: Yes, I want that. But you have stipulated orally. I will tell you what I will do. Let us mark this one first offered Exhibit 1 for identification.

Mr. Turnbull: The one on which the ruling is pending on the objections thereto?

The Court: Yes. Exhibit 1 for identification.

Mr. Turnbull: I offer, therefore—before your Honor rules on the question of evidence which is the offer and [58] objection thereto—the exemplified copy in the Youngblood case showing the existence of certain real property and the sale thereof under judicial process.

The Court: All right. I will receive that only as material so far as it shows as a fact that real property existed at the time of the judgment to which the lien would attach.

Mr. Turnbull: I want to show, as a part of my proof of insolvency, that she owed debts in excess of the statutory amount of \$1,000 which is required under the jurisdictional provisions of the Act.

I also offer it for the purpose to show the question of insolvency, that she had a judgment against her there.

The Court: You did not mention that before. So I will have to think about it.

Mr. Casey: That is why I said, your Honor, there was a nigger in the woodpile; and there is one more thing he has said he mentioned.

Mr. Turnbull: I have got to prove those things.

The Court: The point is you have got to prove one thing at a time. I think at the present time I will admit them just for that purpose, so you may renew your offer after I have ruled on this matter.

Mr. Casey: Well, for the purpose of assisting your Honor in ruling, my I ask counsel if he will stipulate that in addition to the property described in that last offer that the respondent had other real property in McKinley [59] County at that time?

Mr. Turnbull: If she did, I don't know what it is.

Mr. Casey: Well, Mr. Phillips knows. Will you so stipulate, Mr. Phillips?

Mr. Phillips: That she had other property?

Mr. Casey: Other real property besides the property described in this Youngblood judgment.

Mr. Phillips: Not that I know of. I think she had a part in Section 11 which she conveyed to her sister.

Mr. Casey: But she didn't convey that in 1937?

Mr. Phillips: I don't know when the conveyance was. She testified it was conveyed in the last proceeding.

Mr. Casey: You have seen the record personally.

The Court: All right. Now, gentlemen, before I go on and state my conclusion, I want to call at-

tention to two very well considered District cases, very late ones, which follow the same principle declared in the cases to which I referred; in fact, cite all those cases. One of them was *In re Day*, Maryland District, Judge Coleman, 1938, reported at 22 Fed. Supp.

Mr. Phillips: What page?

The Court: Page 946. It deals wth the sufficiency of the voluntary petition, alleging an act of bankruptcy under subdivision 3 of Section Three:

"It is well established that, in order to constitute an act of bankruptcy within the meaning of the definition just [60] quoted, a lien must be created. A judgment alone, which does not carry with it a lien, is not sufficient. In other words, a petition for an adjudication which relies upon this provision of the law must, in order to avoid being jurisdictionally defective, allege that a lien has been created * * *"

Then they cite every case I have referred to: *Elkay Reflector Corporation v. Savory*, *In re Hollywood Land and Water Company*, *Weitzel Flooring Corporation v. Getz*; also *In re Summit*, and so forth.

"The petition in the present case contains no allegation that any lien was created. Nor could such have been the case, because in Maryland judgments create liens only on real property and leasehold interests * * * There is no claim that Day owned such property at the time the judgment of September 12th was obtained, or, in fact, at any other time.

No such property is listed by him in the schedules which were filed by him subsequently, with his voluntary petition.

"Because of this clear failure to disclose in the petition the commission of any act of bankruptcy, the petition is jurisdictionally defective * * *"

In other words, they held that the allegations would have to show that a judgment was obtained and that the judgment created a lien upon property which he then owned; that in the absence of that, it was not sufficient. In other words, we have the reverse of the situation. [61]

A still later case is from the same District, *In re Mayhew*, 31 Fed. Supp. 175, by a Judge who is better known to us: Judge Chesnut. There is not a "t" in his name. He will kill you if you put a "t" in that. That is a famous name in Massachusetts. It is spelled C-h-e-s-n-u-t.

Judge Chesnut, I think, is the senior District Judge of the District of Maryland. I know his name has appeared in the records for many, many years. He is considered a very learned Judge. Referring to the question whether a confession of judgment constituted an act of bankruptcy, he says:

"It is argued that a voluntary confession of judgment by a debtor, or active aid to a creditor in obtaining judgment, which constitutes a lien on his property, in favor of one creditor in preference to others, will constitute a transfer. A number of decisions so hold (citing *In re Truitt* and *In re Irish*). But a judgment itself whether confessed or ob-

tained by default is not an act of bankruptcy unless it constitutes a lien on the debtor's property (citing again the Weitzel case and citing his colleague's opinion In re Day and Gilbert's Collier on Bankruptcy, Section 159). The judgment relied on in this case did not create the lien, which had arisen by the attachments levied more than four months prior to the bankruptcy petition. The judgment was no more than a step in the proceeding to enable the creditor to enforce the lien previously obtained. The preference [62] thereby obtained would not be assignable in bankruptcy. See Elkay Reflector Corporation v. Savory, Inc., *supra*, and cases therein cited * * *."

So we have to use the trite phrase "an unbroken line of decisions over a period of at least twenty years." I think it may be thirty years.

Mr. Casey: I might give you the citation, your Honor, in that Eustace case in which I think Judge McCormick did write an opinion. It is in 14 American Bankruptcy Reports, New Series, page 675. As I recall it, it is about 12 or 14 years ago. I think it does cite the Getz case.

The Court: We have the highest regard for the senior Judge of this District and his learning. I would be very much impressed by his reasoning.

Mr. Casey: I think that was based on the Getz case which came out about that same time.

Mr. Turnbull: May I suggest once more, your Honor, something?

The Court: Yes.

Mr. Turnbull: There are no cases that assert that a judgment which does not create a lien on personal property is an exhaustion to the remedy to such extent that no act of bankruptcy exists.

The Court: The main purport of those cases is: if he has acquired any lien on any property, you see.

Mr. Turnbull: Then the balance of Section Three doesn't [63] mean anything at all, not having removed the lien within five days?

The Court: Well, that is what they say. However, I am not basing it on that. I think that is clearly decided in the cases, that the 5-day period is not an addition to the 30-day period. It is within the 30-day period. I am inclined to the view that the creation of the lien starts the running of your period, of your four-months' period; that suffering it constitutes an act of bankruptcy.

Mr. Turnbull: That's right, your Honor. But nobody had a lien on the personal property until—

The Court: Well, that would not be the effect because otherwise, as I say, the period would never run because at any time, 10 years afterwards, if you could find property you could levy an execution. You could start the running of the period again.

Mr. Turnbull: That right's, your Honor, because you have not yet taken the property away from the assets of the bankrupt to the detriment of the other creditors.

The Court: No. Your judgment created your lien on your real property.

Mr. Turnbull: But not a personal lien.

The Court: It doesn't make any difference.

Mr. Turnbull: We have the law before us now in the New Mexico case. We now have the law of New Mexico before your Honor that says it creates a lien on real property, not on [64] personal property.

The Court: There was property to which the lien of the judgment attaches.

Mr. Turnbull: Let us assume that there was real property; there was still no lien on the personal property. Nobody was taking Mrs. Dysart's property away from her until the 7th of July. No other creditor could complain about it because they weren't taking it away from them.

Mr. Casey: You take it away when you get a judgment lien.

Mr. Turnbull: You don't take personal property away just because you get a judgment. Your Honor, counsel knows better than that.

The Court: Well, gentlemen, this Eustace matter is a referee's opinion.

Mr. Casey: I beg your pardon. That's right. That was affirmed by——

The Court: Referee Moss as Special Master.

Mr. Casey: I think probably the result is in the Getz case.

The Court: It is true that he bases it on the Getz case.

Mr. Casey: Yes. I had forgotten that case was reviewed, and perhaps Judge McCormick didn't write the opinion but just affirmed the review.

The Court: Well, I don't think this opinion helps anything one way or the other. Incidentally, in discussing this [65] section, Mr. Remington, whom I cited at the beginning, points to the fact that while many of these cases arose under the sections before the recent amendments, he says that the elements of the fourth act under discussion here are the elements of the third act of bankruptcy under the amendatory act of 1938. So the decisions which interpreted the paragraphs are authority for the same proposition.

It seems to me, gentlemen, that any other interpretation would be very, very dangerous. We have to consider two things. We have to consider the aim of the bankruptcy law to allow honorable relief from one's debts as contradistinguished from the old problem, which especially obtained on the Continent, where any bankruptcy was considered fraudulent; that bearing in mind that where acts of bankruptcy are clearly defined, we should give effect to them; but where the section is relied upon to force into bankruptcy a person who denies that he is guilty of an act of bankruptcy, that we should require a strict compliance with the provisions which define what is an act of bankruptcy which may cause creditors in certain numbers to come into court.

As a Judge of this court we can see quite often unfairness resulting from involuntary petitions.

You gentlemen were not connected with the petition, but recently I had a case before me of a

partner—I don't remember, but perhaps one of you was in the case; I don't try to remember who attorneys are—but we had a case where [66] a partner some eight months ago came into court and endeavored to force the partnership into bankruptcy. He secured the appointment of a receiver and long after came into court; and he was unable to prove that the assets of the partnership at the fair valuation were insufficient to pay the debts; in other words, the statutory definition of "bankruptcy."

The attorney complained and said, "Why, it's eight months ago. I can't prove market value."

He tried to put on one of these referee's appraisers who went by the inventory. I said, "That is not the way of proving value under the law of California. And if it is to your disadvantage, you blame it on the file. Furthermore, when you filed that petition, your petitioner swore that the partnership was insolvent. You should be in a position to prove it."

So I think that I am not interpreting the law strictly but I merely hold that the statute, as it reads to me, could certainly be fraught with grave danger if every time during the life of a judgment, that a creditor might obtain a lien upon any of the debtor's property; that unless the debtor who may have been relieved of the effect of the judgment through the running of the statute of limitations satisfied it within the statutory period, he is guilty of an act of bankruptcy against his will. You

can bring him to where, against his will, you can have him in court and compel him [67] to surrender his property for the adjudication of the court.

The cases clearly intimate the contrary, and certainly the Getz case, which seems to have had the approval of all the other courts, clearly states that if property exists in the hands of the debtor at the time a judgment is entered, then regardless of whether the lien is actually followed up later on after the judgment, the date of the lien controls. I think the very wording of the section is that a lien upon any property of the debtor is proof that the Congress intended that the automatic lien, which most statutes create in favor of the judgment creditor, should be the starting point of the period which we find in subsection 3 of Section Three of the Bankruptcy Act of 1938.

I shall, therefore, sustain the objection to the introduction of Petitioner's Exhibit 1 for identification upon the ground that in the light of the stipulations of fact before the court it is evident that the lien of the judgment had attached long before the expiration of the statutory period and that no new liens created subsequently by periodic attachments served to extend the period so as to make the acts which occurred in 1941, years after the original judgment, acts of bankruptcy.

Now, gentlemen, that disposes of No. 1.

Mr. Turnbull: I think we can conclude the matter very quickly. My offer of the Youngblood, case, your Honor, was admitted for a special purpose. That was marked as an exhibit? [68]

The Clerk: That is Exhibit 1 for identification.

Mr. Turnbull: I would like to offer that in evidence now.

Mr. Casey: We will object to it as irrevelant, incompetent and immaterial, as the judgment therein referred to is the judgment foreclosing the mechanic's lien which is not, of course, an act of bankruptcy; and it is a secured line which, of course, cannot be counted insofar as the unsecured creditors and does not prove or tend to prove any of the issues in this case, except for the sole purpose, as he heretofore stipulated, that it was property owned by the debtor in McKinley County in 1937.

The Court: All right. Mr. Turnbull?

Mr. Turnbull: I will take your Honor's ruling on that, and then I think I can dispose of the whole matter.

The Court: I will sustain the objection, except insofar as the documents referred to are material to prove that at the time of the entry of the judgments in the State of New Mexico the respondent owned certain pieces of real property to which, under the law of New Mexico, as stipulated by counsel, the lien of the judgment will attach.

Mr. Turnbull: And which judgment do you refer to? This Christensen judgment?

The Court: The Christensen judgment, yes.

Mr. Turnbull: If your Honor please, the petitioning creditors at this time declare that the facts relative to the [69] existence of a lien, which is

apart from the question of insolvency, are all embodied in the petitioning creditors' and intervening creditors' Exhibit No. 1, which your Honor has ruled out. It seems, therefore, it should be unnecessary for us to proceed for several days to prove the other issues in the case and then at the end of that time have your Honor rule as you have ruled now that the essential act of bankruptcy has not been proven.

May I suggest, your Honor, therefore, after making that declaration on behalf of the petitioners and the interveners, under your Honor's ruling, the case might be disposed of rather than to compel us to proceed, because otherwise the proceeding is a vain attempt. In other words, your Honor controls the proof of the case. I don't think that we ought to be required to go ahead and now prove these 52 people are creditors because if we got through and your Honor held they weren't creditors—

The Court: The only thing you can do is rest. I am satisfied with this ruling.

Mr. Turnbull: And we are dissatisfied with it.

The Court: I know. I am satisfied with the ruling, but at the same time I don't want to catch you on the alternative dilemma where they will come back and say—you know how they start—"We think the learned trial Judge was wrong."

Mr. Casey: I have a thought that might expedite this. [70] Mr. Turnbull might make an offer of proof.

Mr. Turnbull: Then you will resist it, and we will have to prove it anyway.

Mr. Casey: No. You rest when I resist.

Mr. Turnbull: All right. I think we can do it that way, your Honor.

The Court: If you are satisfied that insolvency exists, as shown by this exhibit, then if you rest without further proof, he can just rest.

Mr. Turnbull: At this time, and in view of the court's ruling that the facts which we have offered in support of one element of our act of bankruptcy would be insufficient, notwithstanding that we should proceed for several days to prove that each and every one of the 52 petitioning and intervening creditors are creditors, and that we should prevail after several days to show that the alleged bankrupt was insolvent, even in that event we would have to have the present ruling of the court against us.

At this time we offer to prove, in lieu of taking up four or five days of the court, the following:

That each and every one of the petitioning creditors, each and every one of the first intervening petitioning creditors, and each and every one of the second intervening petitioning creditors were at the time of the filing of the respective petitions creditors, having provable unsecured claims against the alleged bankrupt, Stella Dysart. [71]

We offer further to prove that at the time of the filing of the original creditors' petition and for all of the four months immediately preceding

thereto, Stella Dysart was insolvent within the meaning of the Bankruptcy Act.

We offer to prove that within the four months and all thereof immediately preceding the first intervening creditors' petition and at the time thereof Stella Dysart was insolvent.

We offer to prove that at the time of the filing of the second intervening creditors' petition and for all the four months immediately preceding thereto Stella Dysart was insolvent.

We offer to prove that none of the debts due the original creditors, petitioning creditors, the first intervening petitioning creditors and the second intervening petitioning creditors have been paid and that all of said sums are due and were at the time of their filing petitions past due and wholly unpaid.

Mr. Casey: Which offer we resist on the ground that the proof, if produced, is irrelevant, incompetent and immaterial in view of the fact that they have no act of bankruptcy and cannot prove one; on the further ground that we do not owe, and we stand prepared to prove we do not owe, any of the petitioning creditors in amounts up to \$500; upon the further ground we are prepared to prove that at all the times mentioned in said petition and at the present time the respondent was and now is solvent. [72]

Mr. Turnbull: We also offer to prove that by the proof heretofore offered in the foregoing avow that the aggregate of the debts due and owing from

Stella Dysart to the respective petitioners, original petitioners, was in excess of \$500; that at the time of the filing of the original petition she owed debts in excess of \$1,000; that the same condition existed at the time of the filing of the first intervening creditors' petition; the same condition existed at the time of the filing of the second intervening creditors' petition.

Mr. Casey: Which offer of proof we resist upon the grounds heretofore stated.

Mr. Turnbull: I think the other matters are admitted in the answer.

The Court: Well, ordinarily, gentlemen, I would not accept this suggestion to short-cut because I would insist that counsel proceed to create a *prima facie* case. Unfortunately the legal question was raised right at the beginning, and it is not my custom to reserve ruling, which I might have done and allowed the testimony as to all matters to proceed and then acted on a motion to dismiss.

I agree with Mr. Turnbull that it would be an idle act and the consumption unnecessarily of judicial time, which is needed elsewhere, to proceed to determine the question of solvency when, even if the court found insolvency to exist under the ruling of the court, the other two elements of the [73] act necessary under subdivision 3 of Section Three could not possibly be proved because I have held that they are not present.

So that in view of the fact that these cases say you have to prove three things: Insolvency, the

existence of a lien, the failure to discharge a lien, I have held that the facts upon which they rely to prove the existence of a lien and failure to discharge do not amount to that in law.

Therefore, two of the elements necessary to prove bankruptcy under this subdivision could never be proved under my ruling.

Mr. Turnbull: I may say, your Honor, I had the same situation practically before another department of this court the other day where petitioning creditors claimed it would take five days to prove their case, and we had a situation very much like this. The court approved that form of procedure.

The Court: Well, I am willing to do that in this particular case because I think we will be avoiding an idle act.

Mr. Turnbull: I have no trick in offering that.

The Court: It is well to say that we ought to determine matters on the merits, but when the legal question is raised which absolutely precludes any settlement on the merits, assuming that the Judge is correct, it is a waste of time to insist on going through the formality, knowing that it would [74] have to end in a dismissal at the end of the petitioners' case, because let us assume that the evidence on the part of the petitioner should be in and respondent should simply decline to offer any evidence upon the ground that, assuming insolvency, the other two elements have not been proved, I would have to grant a motion to dismiss.

Mr. Turnbull: Your Honor rules, then, on that motion adversely. Then I will rest, and that will terminate the proceeding.

The Court: Well, I feel that under the ruling of the court it would be idle to proceed to prove the other elements alleged in the various petitions because even if the elements which Mr. Turnbull has offered to prove were proved, I would still have to dismiss the petition in view of the principle I have declared in sustaining the objection to Petitioner's Exhibit 1. Therefore, the objection to the offer of proof will be sustained.

Mr. Turnbull: May I ask, for the record, do you resist the second portion of the avowal?

Mr. Casey: Yes.

Mr. Turnbull: And both offers of proof are denied?

The Court: Both offers are denied.

Mr. Turnbull: At this time the petitioning creditors and intervening creditors and each of them rest.

Mr. Casey: And the respondent moves for a dismissal.

The Court: Upon the grounds I have already stated, the petition will be dismissed.

[Endorsed]: Filed Jan. 14, 1943. [75]

[Endorsed]: No. 10339. United States Circuit Court of Appeals for the Ninth Circuit. Hugo Von Segerlund, Alice Von Segerlund, Florence Kee Brown, John A. Frear, John S. Cross, Valeria C. Painter, William Pietsch, D. F. Hanley, Bertha Nelson, Alma C. Swenson, Frederick R. Cook, Josephine Kaiser, Beatrice Rummelle, John J. McFarlane, Ada S. Mackey, James P. Mackey, Jr., Amy Simpson, Adelaide G. Sturgis, Margaret Bell Fitzpatrick, Mabel P. Travis, Eliza J. Fulton, Margaret Minnick, Nellie Nelson Lee, Ida Swenson, Bertha Kenniston, S. H. Kenniston, Caroline A. Wilde, Mrs. August Dresch, Henry A. Kulha, Leonia E. Kulha, Albert G. Loelike, Reinholdt A. Wolter, Adeline B. Wolter, Silas Whitcomb, W. H. Borton, Henrietta Bernitt, Virginia Magale Coshott, Josie C. Ide, by W. H. Borton, her attorney in fact, and Ambrosia Investors' Company, Inc., a corporation, Appellants, vs. Stella Dysart, individually and Stella Dysart, also doing business as the Ambrosia Club and the Mutual Land Owners, Limited, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed: January 7, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth CircuitIn Bankruptcy
No. 10339

In the Matter of

STELLA DYSART, Individually, and STELLA
DYSART, also doing business as the Ambrosia
Club and the Mutual Land Owners Limited,
Bankrupt.STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

Come Now the petitioning creditors and the intervening petitioning creditors herein, and each of them, the appellants herein, and hereby submit a concise statement of points on which the appellants and each of them intend to rely on the appeal of the above entitled proceeding, as follows:

I.

That the above entitled District Court erred in dismissing the bankruptcy proceedings and in refusing to permit the petitioning creditors and the intervening creditors to prove the allegations of their respective petitions, to-wit: the Creditors' Petition, the First Intervening Creditors' Petition, and the Second Intervening Creditors' Petition, and each of them.

II.

That the above entitled District Court erred in making its order of November 7th, 1942, dismissing

the said bankruptcy petitions of the original and intervening creditors, the appellants herein.

III.

That the above entitled District Court erred in refusing to permit the appellants, both the original petitioning creditors and the intervening petitioning creditors, to prove by legal evidence the allegations of their respective petitions, particularly in this: in refusing to accept in evidence that certain authenticated copy of the Judgment, the Execution, the Sheriff's Notice of Levy of Execution, the Sheriff's Return of Sale, and the Court's Order approving the Sheriff's sale as made by the officials of the County of McKinley, State of New Mexico, in that action entitled "Mary Christensen, Plaintiff, vs. Stella Dysart, Defendant"; and in denying the petitioners the right to have in evidence the authenticated copies of the Judgment, Execution, Sheriff's Return of Sale and the Court's Order approving the Sheriff's sale, in those certain proceedings had in the First Judicial District Court of McKinley County, State of New Mexico, entitled "E. H. Youngblood, Plaintiff, vs. Stella Dysart, Defendant", said authenticated copy being duly certified to by the Clerk of the said Court, and by the Judge of said Court; and in refusing to permit the petitioning creditors and the intervening petitioning creditors to prove the allegations of their respective petitions, to-wit, in refusing to permit the appellants to prove that Stella Dysart was insol-

vent at the times alleged in the respective petitions of said creditors, and in refusing to petitioning creditors and intervening petitioning creditors the right to prove that they were creditors, that they had legal, provable claims against Stella Dysart, unsecured, in amounts aggregating in excess of the statutory required Five Hundred (\$500.00) Dollars, and that said Stella Dysart, the bankrupt, owed debts in excess of One Thousand (\$1000.00) Dollars; in refusing to permit the appellants to prove that Stella Dysart was insolvent, and in refusing to permit appellants to prove that Stella Dysart committed the acts of bankruptcy alleged by the respective petitioning creditors and the intervening petitioning creditors in their respective petitions.

IV.

That the above entitled Court erred in concluding as a matter of law that Stella Dysart had not committed an act of bankruptcy when it appeared from the final judgment and records of the First Judicial District of McKinley County, State of New Mexico, that Stella Dysart had, while insolvent, permitted certain creditors to obtain a lien, to wit, had permitted Mary Christensen to levy upon personal property of Stella Dysart by means of a writ of execution, had permitted the Sheriff of McKinley County, to set for sale and to sell and dispose of personal property of Stella Dysart, the said Stella Dysart not having within five days or at all to cause said levy of writ of execution to be vacated or set aside, having permitted a final dis-

position to be made by execution sale of the said personal property of said Stella Dysart in McKinley County, State of New Mexico, within four months immediately preceding the filing of the petition of the petitioning creditors and the intervening petitioning creditors herein, the said Stella Dysart being insolvent at all of said times.

Dated at Los Angeles, California November 19, 1942.

RUPERT B. TURNBULL and
L. H. PHILLIPS
By L. H. PHILLIPS
Attorneys for Petitioning
Creditors and Intervening
Creditors.

[Endorsed]: Filed Jan. 7, 1943, Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF THE RECORD
TO BE PRINTED

To Paul P. O'Brien, Clerk of the above named
Court:

The petitioning creditors and intervening petitioning creditors herein hereby designate the portions of the record, proceedings and pleadings in the above entitled cause to be contained in the record on appeal and to be printed as follows:

(1) Creditors' Petition. (Omit titles of Court and Cause).

(2) Intervening Creditors' Petition. (Omit titles).

(3) Second Intervening Creditors' Petition. (Omit titles).

(4) Bill of Particulars. (Omit titles).

(5) Authenticated copy of the record in "Mary T. Christensen, Plaintiff, vs. Stella Dysart, Defendant", as made by the Clerk and Judge of McKinley County, State of New Mexico, Action No. 5134, designated in the record as "Petitioning Creditors Exhibit No. 1 for Identification."

(6) Authenticated copy of the record in the case of "E. H. Youngblood, Plaintiff, vs. Stella Dysart, Defendant," Action No. 5414, First Judicial District Court, County of McKinley, State of New Mexico, as made by the Clerk and the Judge of said Court, designated in the evidence in this case as "Petitioning Creditors Exhibit No. 2 for Identification."

In printing the Exhibits please print Petitioning Creditors Exhibits Nos 1 and 2 verbatim.

7. Notice of appeal and record of service thereon. (Omit titles).

8. Statements of Points on which Appellants intend to rely. (Omit titles).

9. This designation of contents of record on appeal. (Omit titles).

10. Findings, Conclusions and Judgment of Dismissal. (Omit titles).

11. Cost Bond on Appeal. (Omit titles).
12. Order Extending Time Within which Appellant may file record on appeal.

RUPERT B. TURNBULL and
L. H. PHILLIPS
By L. H. PHILLIPS
Attorneys for Petitioning
Creditors and Intervening
Creditors.

[Endorsed]: Filed Jan. 7, 1943, Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

REQUEST AND DESIGNATION BY APPELLEE FOR ADDITIONAL CONTENTS OF RECORD ON APPEAL

Stella Dysart, the respondent in the above entitled matter, herewith files this her request and demand and designation for contents of the record to be used on appeal herein by the Appellants, and herewith designates as necessary and proper for the contents for said record on appeal, the following documents and data, in addition to the designation for such record on appeal as filed by Appellants herein, and herewith respectfully requests and demands that the following documents be included, together with these designated by the Appellant as part of the records on appeal here,

1. Answer of Stella Dysart to the original Involuntary Petition by six creditors.

2. Answer of Stella Dysart dated July 16, 1942 to the Petition of Creditors to Intervention and Supplemental Involuntary Petition by Creditors by William Pietsch, et al.

3. Answer of Stella Dysart dated July 16, 1942 to the petition to intervene and Supplemental Involuntary Petition by Creditors by W. H. Brown, et al.

4. Stenographic Report of Proceedings had at the trial of the above entitled action by the Honorable Leon Yankwich of November 4, 1942.

5. This Designation of Record on Appeal by the Appellee herein.

HIRAM E. CASEY

S. BERNARD WAGER

By HIRAM E. CASEY

Attorneys for Appellee

Stella Dysart

Receipt of copy of within Designation admitted this 29th day of Jan. 1943.

RUPERT B. TURNBULL and

L. H. PHILLIPS

By L. H. PHILLIPS

A.G.C.

Attorneys for Appellants

[Endorsed]: Filed Feb. 1st, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S OBJECTION TO PRINTING
OF ENTIRE STENOGRAPHIC REPORT

Comes now the appellant and objects to appellee's designation for additional contents to be printed in the record, namely: item 4, "Stenographic Report of the proceedings had at the trial of the above entitled action before Hon. Leon Yankwich on November 4, 1942," on the ground and for the reason that said Stenographic Report as designated by appellee contains statements made only by the Court and Counsel and does not contain any evidence material to the issue on the appeal herein.

Dated this 18th day of January, 1943.

RUPERT B. TURNBULL and

L. H. PHILLIPS

By L. H. PHILLIPS

Attorneys for Appellants.

Received copy of the within objections this 19
day of January, 1943.

HIRAM E. CASEY and

S. BERNARD WAGER,

By S. BERNARD WAGER

Attorneys for Appellee.

[Endorsed]: Filed Jan. 20, 1943. Paul P.
O'Brien, Clerk.

No. 10339.

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

HUGO VON SEGERLUND, ALICE VON SEGERLUND, FLORENCE KEE BROWN, JOHN A. FREAR, JOHN S. CROSS, VALERIA C. PAINTER, WILLIAM PIETSCH, D. F. HANLEY, BERTHA NELSON, ALMA C. SWENSON, FREDERICK R. COOK, JOSEPHINE KAISER, BEATRICE RUMMELLE, JOHN J. MCFARLANE, ADA S. MACKEY, JAMES P. MACKEY, JR., AMY SIMPSON, ADELAIDE G. STURGIS, MARGARET BELL FITZPATRICK, MABEL P. TRAVIS, ELIZA J. FULTON, MARGARET MINNICK, NELLIE NELSON LEE, IDA SWENSON, BERTHA KENNISTON, S. H. KENNISTON, CAROLINE A. WILDE, MRS. AUGUST DRESCH, HENRY A. KULHA, LEONIA E. KULHA, ALBERT G. LOELIKE, REINHOLDT A. WOLTER, ADELINA B. WOLTER, SILAS WHITCOMB, W. H. BORTON, HENRIETTA BERNITT, VIRGINIA MAGALE COSHOTT, JOSIE C. IDE, by W. H. BORTON, her attorney in fact, and AMBROSIA INVESTORS' COMPANY, INC., a corporation,

Appellants,

vs.

STELLA DYSART, individually and STELLA DYSART, also doing business as the Ambrosia Club and the Mutual Land Owners, Limited,

Appellee.

APPELLANTS' OPENING BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

RUPERT B. TURNBULL,

L. H. PHILLIPS,

400 Title Insurance Building, Los Angeles,

Attorneys for Appellants.

FILED

FEB 26 1942

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PAUL F. O'BRIEN
CLERK



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Appellants,

vs.

STELLA DYSART, individually and STELLA DYSART, also doing business as the Ambrosia Club and the Mutual Land Owners, Limited,

Appellee.

APPELLANTS' OPENING BRIEF.

Facts and Authorities Regarding Jurisdiction.

Appellants filed their respective creditors' and intervenors' petitions in bankruptcy in the District Court of the United States for the Southern District of California. Original petition filed July 5, 1941. [Tr. p. 10.] Intervening creditors' petition filed July 29, 1941. [Tr. p. 37.] Second intervening petitioning creditors filed October 17, 1941. [Tr. p. 54.]

The said court had jurisdiction of said proceedings by virtue of subdivision (1) of Section 2(a) and subdivisions (a), (b) and (d) of Section 5 of the Bankruptcy Act.

A final order dismissing said proceedings was entered November 7th, 1942. [Tr. p. 147.]

Notice of appeal was filed by appellants on November 23, 1942. [Tr. p. 149.]

Order extending time to file record on appeal was made and filed December 7, 1942. [Tr. pp. 153-4.]

Appellants rely on provisions of subdivisions (a) and (b) of Sections 24 and 25(a), Bankruptcy Act, to sustain jurisdiction of Circuit Court.

The proceedings were completed pursuant to Federal Rules of Civil Procedure, Rule 73 (a), (b), (c) and (g) and Rule 75.

Statement of the Case and Question Involved.

Three sets of creditors, totaling fifty-two in number, filed their respective petitions in bankruptcy, seeking to adjudicate Stella Dysart a bankrupt. The original creditors' petition was followed by a first intervening creditors' petition and a second intervening creditors' petition. Each creditor alleged that he was an unsecured creditor.

The acts of bankruptcy alleged are made expressly within the provisions of subdivision 3, Section 3 of Chapter 3 of the Bankruptcy Act, to-wit:

“Section 3, Acts of Bankruptcy.

(a) Acts of Bankruptcy by a person shall consist of his having (1) * * * (2) * * * (3) suf-

ferred or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien within thirty days from the date thereof, or at least five days before the date set for any sale or other disposition of such property;"

The petitioning creditors expressly set forth the facts which constituted such act of bankruptcy alleging that one Mary Christianson had obtained a judgment in McKinley County, New Mexico; had levied a writ of execution within four months prior to the filing of the bankruptcy proceeding, had levied upon *personal* property of the bankrupt, and that the Sheriff of McKinley County had sold the *personal property* at public auction, and that the bankrupt had not vacated or discharged the lien, either within thirty days from the date thereof, or had not discharged the lien within five days before the sale, and that the property had gone to sale and had been lost to general creditors.

Upon the trial, the petitioning creditors offered in evidence an exemplified copy of the following papers in the Christianson v. Dysart case: The exemplified record showing the judgment, *three* writs of execution, the return of the Sheriff showing the levy on the *personal property* and the nature thereof, the Sheriff's return showing he had made a sale under the execution, and the order of the court approving and confirming such Sheriff's sale. These records bore the certificate of the custodian of the record, to-wit: the clerk of the court, the certificate of the judge of the court, and the certificate of the clerk certifying

to the capacity of the judge. [Tr. pp. 144-145.] No objection was made to the form in which the record was taken.

"Mr. Turnbull: There was a previous bankruptcy proceeding which resulted in adjudication by the Circuit Court and reverse of it by the United States Circuit Court of Appeal on the ground that the act of bankruptcy was not completely proven. I make that statement because some of the records that are being brought here from New Mexico today will be complete, whereas heretofore they were not.

The Court: All right.

Mr. Turnbull: The petitioning creditors and the intervening creditors at this time offer in evidence an exemplified copy of a record of a proceeding in which Mary T. Christensen is plaintiff and judgment creditor and in which the alleged bankrupt, Stella Dysart, was defendant. That record is one bearing the certificate of Eva Ellen Saben, the clerk of the District Court in and for the County of McKinley, New Mexico; the certificate of District Just Kool, and the certificate of Eva Ellen Saben, the clerk of the court, that the Judge is the Judge, which certificates on the part of the clerk are under seal of that court and which record, so certified, consists first of a judgment in favor of Mary T. Christansen against Stella Dysart, as appears on its face, a series of executions, particularly one we are interested in here, however, being the one containing the sheriff's levy and the sale of which was had [5] on the 7th of July, 1941.

The Court: Is that in support of paragraph 6 of your original petition?

Mr. Turnbull: I don't know the number. It is the one of Mary T. Christansen's judgment.

The Court: Yes.

Mr. Turnbull: It appears that the procedure in New Mexico is that after the sheriff makes a sale he reports that sale to the court, and the court makes, and apparently in this case made, an order approving the sale. But the record here being offered is the judgment, the execution of 1941, with respect to the sale of the 7th of July, 1941, and the sheriff's bill of sale and the order approving the sale as made by the Judge of the court." [Tr. pp. 159-160.]

Objection was made by the bankrupt, however, that the record was not admissible in evidence on the ground that the record did not show or tend to show an act of bankruptcy. The court sustained the objection. The petitioning and intervening creditors then offered to prove that Stella Dysart was insolvent at the time the creditors' petitions were filed and at the time of the sale and for a period of four months continuously prior to the creditors' filing of petitions. The petitioning creditors offered [Tr. pp. 225-226] to prove that they, and each of them, were creditors having provable claims against the bankrupt in excess of any securities, and that their claims aggregated in excess of the statutory five hundred dollars in amount, and that they, and each of them, had no security for their claims. The said creditors, and each of them, offered to prove that Stella Dysart owed debts in excess of the statutory one thousand dollars, and was insolvent.

"The petitioners then made an offer of proof to prove that each and every petitioning creditor set forth in the original petition filed herein on the 5th

day of July, 1941, [128] and each and every intervening petitioning creditor named and set forth in the petition of creditors to intervene, and supplemental involuntary petition of creditors filed herein on the 29th day of July, 1941, and every intervening petitioning creditor named and set forth in the petition of creditors to intervene, and supplemental involuntary petition of creditors filed herein on the 17th day of October, 1941, had provable claims against the said alleged bankrupt at the time and in the amounts set forth in the aforesaid petitions, and further offered to prove that at the times set forth in the said petitions, the said petitioning and intervening petitioning creditors had provable claims against the said alleged bankrupt in the sum in excess of five hundred (\$500.00) dollars, which were past due and unpaid, and that at the times set forth in the said petitions the said bankrupt owed debts in excess of one thousand (\$1,000.00) dollars, and further offered to prove that at all of the times set forth and mentioned in the said petitions and at the dates of the alleged acts of bankruptcy that the said alleged bankrupt was insolvent. The said alleged bankrupt thereupon resisted the offers of proof, which said resistance was sustained by the court and the offers of proof denied.” [Tr. pp. 146-147.]

An objection was made to such offer of proof by the bankrupt on the ground that no act of bankruptcy had been proven or could be proven under the ruling of the court, and the said objection was sustained and the creditors, and each of them, were denied the right to proceed to prove any of the matters offered to be proven. The court thereupon made its order dismissing the respective

creditors' petitions and dismissing the entire bankruptcy proceeding; the reason given by the court for his decision in the matter was that under the laws of the State of New Mexico, a judgment was a lien upon any real property of the judgment debtor and that as the law made it a lien, no subsequent levy of a writ of attachment upon *personal* property could create a new or different lien which would constitute an act of bankruptcy.

It was stipulated by all parties that under the laws of New Mexico a judgment was not a lien upon personal property. [Tr. p. 175.]

Question Involved.

Does the existence of a state law making a judgment an apparent lien on real property (but not on personality) *ipso facto* prevent other creditors of the judgment debtor from urging as an act of bankruptcy a new and subsequent levy of execution and sale of personal property within the inhibited four months' period before bankruptcy?

Statement of Facts.

The statement of the case, as hereinbefore recited, of necessity contains the facts; they are not repeated here. We must keep in mind that on the third writ of execution the levy and sale was on *personal* property and made within the four months' period prior to THIS bankruptcy.

ARGUMENT.

POINT I.

The Trial Court Committed Reversible Error When It Refused to Accept as Evidence the Exemplified Record Showing a Judgment, Execution, Levy of Execution, Sale Within Four Months, of Personal Property Under Execution, and the Order of the New Mexico Court Approving and Confirming Such Sale and Sheriff's Bill of Sale.

These same original petitioning creditors were before this court approximately a year ago on a bankruptcy of the same title as the instant case. At that time these original petitioning creditors came to this court as respondents on an appeal from an adjudication in bankruptcy. This court held that the proof offered at that trial, to-wit: the offer *only* of the judgment, the execution, and the levy of the execution in the case of Mary Christianson, plaintiff, v. Stella Dysart, was not sufficient proof of an act of bankruptcy under subdivision 3 of Section 3 of the Bankruptcy Act. This court held that while it was proved that a judgment existed and an execution levy had been made upon *personal property*, there was no presumption that could be indulged in that there had been an actual sale of the property, or that the bankrupt had not, within five days, had the levy vacated or discharged, or had other disposition made of the property. This court said that it was necessary for the petitioning creditors to prove every one of the factors which were essential to the act of bankruptcy, defined in said subdivision 3 of Section 3, to-wit: That there was a judgment; that there was a levy on property, and that there was a sale set and had which was not disposed of by the bankrupt within at least five days before such sale.

After the decision by this court and the reversal of the trial court, the bankrupt proceeding was dismissed. The original petitioning creditors then filed a new petition seeking the adjudication of the same Stella Dysart. They were joined by other creditors who filed intervening petitions. It is that second case which is now before this court.

Upon the trial of this action the petitioning and intervening creditors offered in evidence the exemplified copy of the record of the case of Mary Christianson v. Stella Dysart. It was duly exemplified by the certificate of the clerk of the court rendering the judgment, the certificate of the judge of that court, and the certificate of the clerk attesting to the capacity of the judge. The exhibit is in the record herein as Petitioners' Exhibit No. 1, for identification. [Tr. pp. 76-120, incl.] It consists of the judgment showing Mary Christianson was a judgment creditor of Stella Dysart, to which is added three writs of execution, to which is added the Sheriff's return with respect to the levy of that writ of execution upon personal property of Stella Dysart in McKinley County, New Mexico, all within the four months' period prior to the filing of the creditors' petitions herein, to which is added the Sheriff's return that he had sold the property on the date given in the notice of sale, to which is added the decree or order of the court in McKinley County, New Mexico, confirming and approving the sale as so had by the Sheriff. The first two writs of execution referred to previous levies and are not essential to the proof of the act of bankruptcy herein relied upon.

It will be noted that the levy was made within the one hundred and twenty day period, prior to the filing of the creditors' petitions, and that the sale of the personal prop-

erty under execution occurred within such period. Petitioners assert that they have offered to prove and have proven in the manner approved by the law, the act of bankruptcy alleged. We assert that we have offered the best evidence—the record duly authenticated—and that it constitutes an act of bankruptcy as defined by subdivision 3 of Section 3 of Chapter 3 of the Bankruptcy Act. The levy of the writ of execution constituted a lien. That lien was not discharged or vacated at any time, either within the five days' period, or at all. The date set for the sale was definite and the sale occurred on that date. The bankrupt did not cause "other disposition of such property" to be made.

Authorities.

In discussing this act of bankruptcy, Collier says in the 12th Edition:

"This has been well termed 'passive act of bankruptcy.' It differs from the corresponding act in the law of 1867, in that intent is not material. * * * There is a similar provision in the Canadian Bankruptcy Act of 1919. The corresponding clause in the English Bankruptcy Act is also of interest."

Collier's, 12th Ed., p. 106.

"On the question as to whether intent is an element in this act of bankruptcy, the earlier and most of the later cases have held that intent had been dropped out, and that result,—the inequity flowing from the transaction, rather than the animus of it—had been substituted instead. * * * The question reached the Supreme Court late in 1901, and was then settled by a five-to-four decision in *Wilson Bros. v. Nelson*, which, reversing the court below, upholds the

majority of the previous cases, and finally determines that intent is not an element of pleading or proof where the third act of bankruptcy is relied on. As therein stated the act ‘makes the result obtained by the creditor and not the intent of the debtor the essential fact.’ In other words, it is now the settled law that an insolvent may be thrown into bankruptcy by the requisite number of his creditors, if a judgment has been entered against him, execution issued and levy made, and sale five or less days away, irrespective of whether he procured or merely could not prevent the judgment against him. This, from the creditor’s standpoint, is the high-water mark of Anglo-Saxon ‘acts of bankruptcy.’ ”

Collier’s, 12th Ed., pp. 107-108.

“ ‘Legal proceedings’ means proceedings in a court to assert a legal remedy to obtain an equitable relief. They include all proceedings in a court of justice, interlocutory or final, whereby the property of the debtor is seized and diverted from the general creditors. The issuance of execution and a levy under a confession of judgment was ‘legal proceedings’ within the clause.”

Collier’s, 12th Ed., p. 110.

“ ‘Sale or final disposition’ as used in this clause means an act having the effect of a sale whereby the ownership and control of the property is transferred from one person to another.”

Collier’s, 12th Ed., p. 111.

“It is not the judgment itself or the levy thereunder which constitutes the act of bankruptcy, but the failure on the part of the debtor to have the same

vacated or discharged five days before a sale or the final disposition of the property."

Collier's, 12th Ed., p. 112.

Citing:

In re Vastbinder, 113 Bankruptcy Repts. 118, 126 Fed. 417;

Matter of Rung Furn. Co. (Circuit Court of Appeals of the Second Circuit), 14 A. B. R. 12, 139 Fed. 526;

Folger v. Putnam (Circuit Court of Appeals for the 9th Circuit), 28 A. B. R. 173, 194 Fed. 733.

In the case of *Citizens Banking Company v. Ravenna* Bank, 234 U. S. 360, 34 Sup. Ct. Rep. 806, the Supreme Court says:

"Looking at the terms of this provision it is manifest that the act of bankruptcy, which it defines, consists of three elements; the first is of insolvency of the debtor, the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon the property of the debtor by means of a judgment, attachment, execution or kindred proceeding, the enforcement of which will enable the creditor to collect the greater percentage of his claim out of other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference, five days before a sale or final disposition of any property affected."

Petitioners were entitled to prove the act of bankruptcy as alleged, and they were denied their substantial rights when the trial court held that no such act of bankruptcy existed.

POINT II.

The Trial Court Committed Reversible Error and Denied the Petitioning Creditors Their Rights When He Refused to Receive in Evidence the Exemplified Record of Youngblood vs. Dysart.

Petitioning creditors were entitled to prove Stella Dysart was insolvent during the four months' period and immediately prior to the filing of their petitions. [Tr. p. 221.] They were entitled to show what became of Stella Dysart's property which caused her to be insolvent. The exemplified record of the proceedings in Youngblood v. Dysart in McKinley County, New Mexico, showed what became of Stella Dysart's property. The record showed that the real property was sold and disposed of. The record also contained the final judgment which showed, at least in part, the existence of the debts of Stella Dysart. It was incumbent upon the petitioning creditors to show that Stella Dysart owed debts in excess of the statutory one thousand dollars. Likewise, when the court refused to permit the introduction of the exemplified record from McKinley County, in the case of Youngblood, plaintiff, v. Stella Dysart [Tr. pp. 220-221, incl.], it committed a reversible error and denied the petitioning creditors their substantial rights in court, for that judgment showed a disposition of Stella Dysart's property, and showed indebtedness of Stella Dysart.

POINT III.

The Trial Court Committed Reversible Error in Denying to Petitioning Creditors Their Substantial Rights When It Denied the Creditors the Right to Prove Insolvency, to Prove Their Status as Creditors, and to Prove the Nature, Amount and Extent of the Indebtedness of Stella Dysart, and Dismissed the Bankruptcy Proceeding.

After the trial court had announced its decision that it did not consider the acts of bankruptcy alleged capable of proof because of the fact that a judgment in New Mexico, like one in California, constitutes an apparent lien against real properties of the judgment debtor within the county, the creditors offered to prove that Stella Dysart was insolvent at the times complained of and within the four months' period required by the statute. The creditors offered to prove that they, and each of them, were creditors, having provable claims against the bankrupt in excess of the statutory amount. They offered to prove that they, and each of them—fifty-two in number—were creditors at the time complained of, and that Stella Dysart owed in excess of the statutory one thousand dollars, and was insolvent at the times the acts of bankruptcy were committed and was insolvent at the time the creditors' petitions were filed. The trial court refused to permit this proof on the ground that the facts and the record relied upon by the petitioning creditors, did not constitute acts of bankruptcy. While this was a short-cut method of ending the trial, it did in fact constitute a continuing error.

Conclusion.

It is apparent from the statement of the facts above and a mere reference to subdivision 3 of Section 3 of Chapter 3 of the Bankruptcy Act, that the order dismissing the proceedings was erroneous.

We respectfully submit that these fifty-two petitioning creditors are entitled to prove the acts of bankruptcy alleged, and that the proof offered was the best evidence of such facts; that the same proves the acts of bankruptcy alleged.

We respectfully submit that the trial court's order should be reversed and that the matter be sent back for trial on the merits.

Respectfully submitted,

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Counsel for Petitioning and Intervening Creditors.



No. 10,339.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HUGO VON SEGERLUND, ALICE VON SEGERLUND, FLORENCE KEE BROWN, JOHN A. FREAR, JOHN S. CROSS, VALERIA C. PAINTER, WILLIAM PIETSCH, D. F. HANLEY, BERTHA NELSON, ALMA C. SWENSON, FREDERICK R. COOK, JOSEPHINE KAISER, BEATRICE RUMMELLE, JOHN J. MCFARLANE, ADA S. MACKEY, JAMES P. MACKEY, JR., AMY SIMPSON, ADELAIDE G. STURGIS, MARGARET BELL FITZPATRICK, MABEL P. TRAVIS, ELIZA J. FULTON, MARGARET MINNICK, NELLIE NELSON LEE, IDA SWENSON, BERTHA KENNISTON, S. H. KENNISTON, CAROLINE A. WILDE, MRS. AUGUST DRESCH, HENRY A. KULHA, LEONIA E. KULHA, ALBERT G. LOELIKE, REINHOLDT A. WOLTER, ADELINA B. WOLTER, SILAS WHITCOMB, W. H. BORTON, HENRIETTA BERNITT, VIRGINIA MAGALE COSHOTT, JOSIE C. IDE, by W. H. BORTON, her attorney in fact, and AMBROSIA INVESTORS COMPANY, INC., a corporation,

Appellants,

vs.

STELLA DYSART, individually, and STELLA DYSART, also doing business as the Ambrosia Club and the Mutual Land Owners, Limited,

Appellee.

APPELLEE'S REPLY BRIEF.

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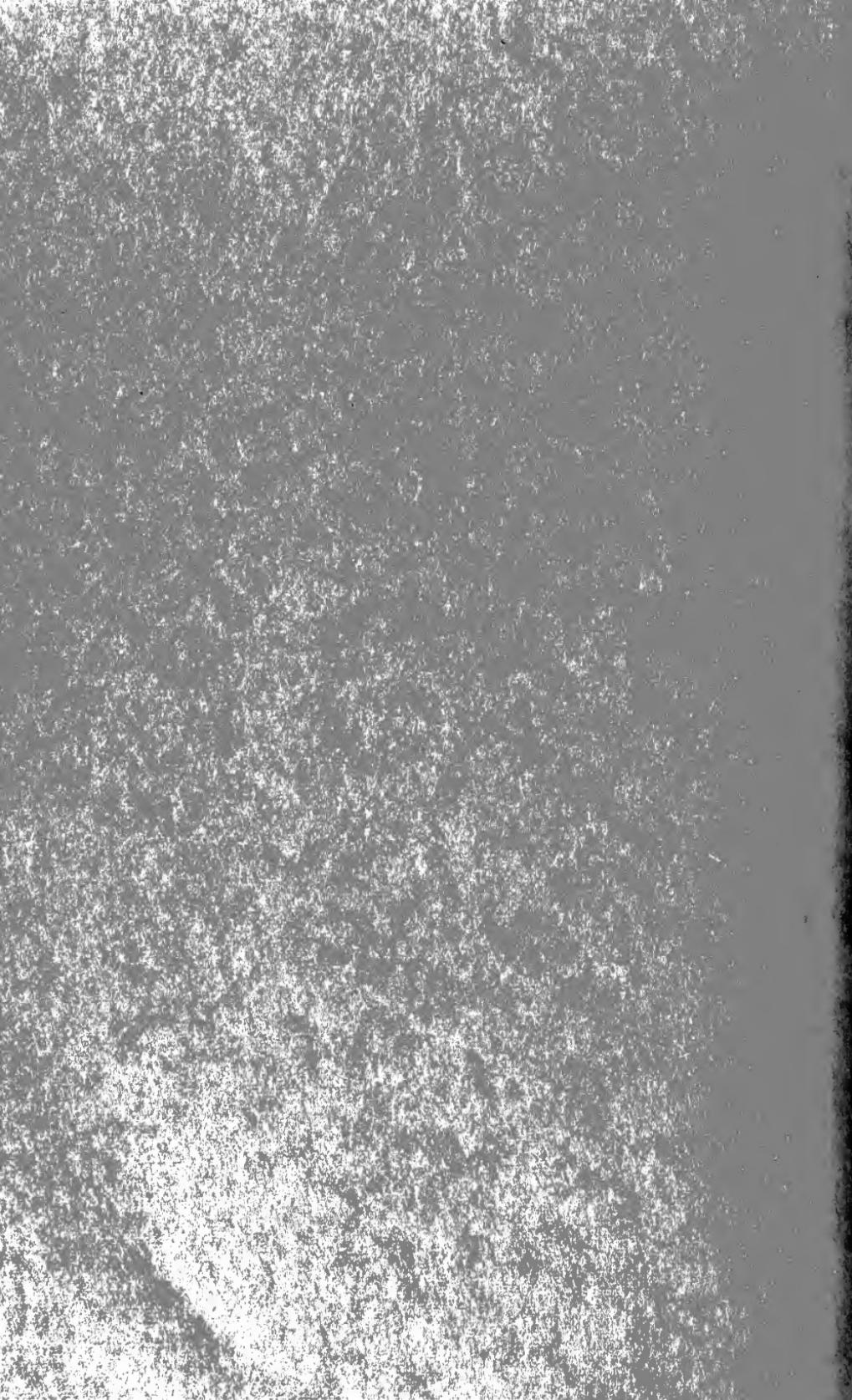
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Appellants,

vs.

STELLA DYSART, individually, and STELLA DYSART, also doing business as the Ambrosia Club and the Mutual Land Owners, Limited,

Appellee.

APPELLEE'S REPLY BRIEF.

Statement of Facts.

To the statement of the case as set forth by the appellants beginning at page 2 of their opening brief should be added that the judgment referred to by them in the case of *Mary T. Christensen, plaintiff, v. Stella Dysart, et al., defendants*, in the District Court of the state of New Mexico, First Judicial District in and for the county of

McKinley, and numbered 5134, was procured in the February Term in 1937, and was docketed in the office of the county clerk in McKinley county, New Mexico, on March 22, 1937 [Tr. p. 210]; that at that time the respondent herein had real property in McKinley county, New Mexico, upon which this judgment then became a lien [Tr. pp. 205-206]; that under the laws of New Mexico, as they then existed, the judgment docketed in the office of the county clerk became a lien upon the real property of the judgment debtor in the county [Tr. pp. 204-205]; that petitioning creditors' Exhibit 2 the judgment record in the Youngblood action was received in evidence for limited purposes as therein set forth [Tr. pp. 210-211-221]; that the Christensen judgment herein referred to is the same judgment that was alleged to have created an act of bankruptcy in the previous bankruptcy petition filed against this respondent, and which matter was heretofore passed upon by this Circuit Court in the matter of Dysart vs. Von Segerlund, *et al.*, numbered 9576, and reported in Volume 118, Federal (2d), page 482, and decided March 22, 1941.

That an execution on personal property was issued and levied on the Christensen judgment on September 8, 1937 [Tr. p. 85], and then again on November 31, 1939. [Tr. p. 87.]

Question Involved.

The question involved might be restated as being whether, where a judgment had become a valid existing lien upon real property of the judgment debtor, and had so remained for more than four months, and then thereafter, the judgment creditor caused an execution on said judgment to be levied upon other property of the judgment debtor, the said lien so created by the levy on the other property by the subsequent execution and more than four months subsequent to the creation of the original lien on the real property of the judgment debtor, could be an act of bankruptcy, assuming the other necessary elements thereof are present. In short, whether, if a lien is obtained by judgment before the determining period has commenced to run, and enforcement proceedings are instituted within the four months' term, a complete act of bankruptcy has been committed.

ARGUMENT.

POINT I.

The Trial Court Properly Refused to Accept as Evidence, for the Purpose of Establishing an Act of Bankruptcy, the Record in the Christensen Case Showing the Levy of the Execution and Sale Within Four Months of Personal Property Thereof.

Section 3 (a), Sub. 3 of the Bankruptcy Act provides:

“Acts of bankruptcy by a person shall consist of his having suffered or permitted, while insolvent, any creditor to *obtain a lien* upon *any* of his property through legal proceedings, and not having vacated or discharged such lien within thirty days from the date thereof, or at least five days before the date set for any sale or other disposition of such property.”

(Emphasis by italics supplied.)

It will be noted that the judgment in the *Christensen* case became a lien upon the property of the Stella Dysart in March, 1937. The petitions to have the Stella Dysart adjudicated a bankrupt herein were filed July 5, 1941 [Tr. p. 10], July 29, 1941 [Tr. p. 37], and October 17, 1941 [Tr. p. 54], and consequently each of the said petitions herein was filed more than four months subsequent to the procurement of the lien of the Christensen judgment in March, 1937. In other words, Mary Christensen, by her judgment docketed in March, 1937, procured a lien upon property of Stella Dysart before the determining period herein. After having issued two executions [Tr. pp. 85 and 87], she again issued an execution and caused it to be levied and a sale of property under it on July 7, 1941, under an execution issued May 7, 1941. The first two executions herein referred to were, as was the lien,

created by the judgment when docketed in March, 1937, created and levied before the determining period herein involved had commenced to run.

The petitioning creditors herein now assert their claim that a new act of bankruptcy was created by the issuance and levy by an alias writ of execution [p. 89] on the balance of the Christensen judgment, and the execution by the sheriff showing the levy of the said writ. This execution was issued May 5, 1941 [Tr. pp. 89-90], and the sale was had July 7, 1941, more than four years after Christensen obtained a lien on property of Stella Dysart, and thus nearly four years beyond the period which the Bankruptcy Act states creates an act of bankruptcy.

The objection to the petitioning creditors offer of the record in the Christensen judgment raised the question immediately as to whether, where, as here, a judgment creditor had a lien by her judgment on real property of the judgment debtor, the enforcement of which would have enabled her to collect a greater percentage of her claim than other creditors of the same class, could after the passing of four months from the procurement of her lien on real property, thereafter levy an execution issued out of the said judgment upon personal property, and the lien thus procured by the levy upon personal property be used as an act of bankruptcy. This was the point directly presented to the Court [Tr. p. 174], which was argued at length, and the Court carefully went through the authorities presented to determine what its ruling should be. [Tr. pp. 170-203.] Notwithstanding the existence of this situation the appellants have failed to cite in their opening brief a single authority to substantiate the position assumed by them at the trial of the case, nor have they cited a single case in their brief that holds contrary to the

decision of the Court below, to the effect that if at any time a lien was actually obtained by the judgment against any of the property of the debtor, that that exhausts the power of this action and that thereafter the running of the four-month period cannot be started by levying another execution out of the same judgment upon other property of the debtor which may make its appearance after the judgment.

Appellants cite and quote from the case of *Citizens Banking Co. v. Ravenna Bank*, 234 U. S. 360 (App. Op. Br. p. 12). In the excerpt so quoted we are not given any aid on the point involved, nor do we see how it is of any benefit to the position taken by the petitioners. However, this decision is cited by the Court in the case of *Hawthorne Valley, Inc. v. Arthur J. Adams*, 69 Fed. (2d) 691, wherein it is stated:

“The court has no jurisdiction to entertain an involuntary petition against an insolvent bankrupt unless it has committed an act of bankruptcy within four months before the petition is filed. Bankruptcy Act, Section 3b, 11 U. S. C. A., Section 21(b).”

But section 3b does not define “an act of bankruptcy.” We must look elsewhere for the definition of the third act of bankruptcy. It is found in *Citizens' Banking Co. v. Ravenna Nat'l Bank*, 234 U. S. 360, 32 Am. B. R. 477, 34 S. Ct. 806, 58 L. Ed. 1352, where the Court said:

“Looking at the terms of this provision, it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execu-

tion, or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision. All this is freely conceded by counsel for the petitioning creditor."

See, also, the analysis of this provision in *Northwestern Pulp & Paper Co. v. Finish Luth. Book Concern* (C. C. A., 9th Cir.), 18 Am. B. R. (N. S.) 541, 51 F. (2d) 340; and *In re Fisher* (D. C., Pa.), 33 Am. B. R. 628, 219 F. 638.

According to the petition the preference consisted of the levy of the *fieri facias* on March 2, 1932. (Mich. Comp. Laws 1929, Section 14541.) But this levy, of March 2, was made more than four months before the petition was filed and we think therefore that there was a failure to aver an act of bankruptcy because the preference which was a constituent element of the act was not "suffered or permitted" within that period.

Northwestern Pulp & Paper Co. v. Finish Luth. Book Concern, supra;

Owen v. Brown (C. C. A., 8th Cir.), 9 Am. B. R. 717, 120 F. 812;

In re Deer Creek Water & Water Power Co. (D. C., Pa.), 29 Am. B. R. 356, 205 F. 205;

In re McGraw (D. C., W. Va.), 43 Am. B. R. 38, 254 F. 442;

Remington on Bankruptcy (3d Ed.), Vol. 1, Sec. 150.

See, also:

In re Superior Jewelry Co. (C. C. A., 2d Cir.), 39 Am. B. R. 575, 243 F. 368;

Colston v. Austin Run Mining Co. (C. C. A., 3d Cir.), 28 Am. B. R. 92, 194 F. 929;

In re D. F. Herlehy Co. (D. C., N. Y.), 41 Am. B. R. 171, 247 F. 369.

It is true that the three cases last cited deal with another element of the combination, *i. e.*, the failure to vacate or discharge the preference at least five days before the sale of the property but they do not differ in principle from the *Northwestern* case, the *Owen* case, and the *Deer Park* case.

We think this interpretation of section 3(a) (3), 11 U. S. C. A., section 21(a) (3) is correct, because, while clause 3 does not in specific terms require that the preference, which the debtor may discharge at least five days before a sale or other disposition of the property affected, shall be obtained within four months before the petition is filed, yet a contrary holding would lead to a situation which we think was never contemplated. (*Owen v. Brown, supra.*) The security of all preferences obtained through legal proceedings at any time however long before the four months' period would be endangered and such a result would be inconsistent with section 67f, 11 U. S. C.

A., Sec. 107(f), as construed in *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 23 S. Ct. 67, 47 L. Ed. 122. For, in that case, the Court said:

“In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. * * * If this were not so the date of the acquisition of a lien by attachment or creditor’s bill would be entirely immaterial.” (Italics ours.)

To the same effect is the case of *In re Getz*, 25 Fed. (2d) 773, at page 774, wherein the Court said:

“The petition avers in substance that the alleged bankrupt, while insolvent and within four months next preceding the filing of the petition, permitted a judgment to be entered against him, which judgment has not been vacated, discharged, or satisfied, and that more than 30 days have elapsed since the entry of the judgment. It is contended that this is not sufficient, because there is no allegation that the judgment is a lien on any property of the bankrupt. The point for decision is whether the word ‘judgment’ in the statute means only a judgment which is a lien upon the property of the alleged bankrupt, or means and judgment, whether a lien or not.

The statute specifies ‘any levy, attachment, judgment, or other lien.’ 11 U. S. C. A., Section 21(a) (4). Many judgments (as in a case where the defendant owns no real estate, but personal property

only) are not liens. There is thus an ambiguity, and it is proper to consider the history and purpose of the legislation in order to determine its true intent. In *Citizens' Banking Co. v. Ravenna National Bank*, 234 U. S. 360, 32 Am. B. R. 477, 34 S. Ct. 806, 58 L. Ed. 1352, the Supreme Court held that the clause providing for the third act of bankruptcy (11 U. S. C. A., Section 21(a) (3)) failed to cover a situation where the bankrupt had permitted a lien to be obtained against his property by legal proceedings, and had then done nothing for a period of more than four months, as a result of which the lien of the judgment had ripened into a legal and enforceable preference.

The amendment of 1926 was designed for the specific and limited purpose of remedying this defect in the existing law. The report of the Senate Judiciary Committee upon the bill says: 'The amendment is for the purpose of preventing a creditor from obtaining a lien and holding it without proceeding to a sale under it until it ripened into a preference.' Clearly, the attention of the Congress was turned only to judgments which were liens. Legislation directed toward judgments which were not liens would have been superfluous. Under the law as it stood before the amendment, no advantage could have been obtained prior to levy by the creditor holding such a judgment, and after levy and upon proceeding to a sale the provision for the third act of bankruptcy struck down the preference.

The context in which the word appears, and the limitations implied in the phrase 'or other liens,' call for the application of the rule of *noscitur a sociis*. *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586. The plain intent of the Congress, as well as the association of the word in the act itself, 'justifies, if it does

not imperatively require,' the conclusion that the judgment meant is a judgment which creates a lien.

If the judgment referred to in the petition is a lien, and so within the meaning of the statute thus construed, the petitioners should be permitted to so aver. Ten days will be allowed for amendment, and in default of such amendment the petition will be dismissed."

This Circuit Court had occasion to refer to the interpretation of section 3, subdivision A of the Bankruptcy Act involved in the present action, when the former involuntary proceedings against Stella Dysart were before this Court. In the case of *Stella Dysart v. Hugo Von Segerlund*, 118 Fed. (2d) 482, this Court stated:

"There is no evidence that appellant, within four months next preceding the filing of the original petition, the supplemental petition or the amended petition, committed any of the acts which section 3, sub. (2), declares to be acts of bankruptcy. There is evidence that appellant suffered or permitted a creditor, Mary T. Christensen, to obtain a judgment against her in 1937, and that she suffered or permitted another creditor, E. H. Youngblood, to obtain a judgment against her in 1938; and we assume, without deciding that Christensen and Youngblood thereby obtained liens upon appellant's property; but there is no evidence that appellant was insolvent when said liens, if any, were obtained. Furthermore, said liens were obtained, if at all, long prior to the commencement of the four months' period specified in section 3, sub. (b)."

Incidentally, in this case the Court mentioned the fact that the judgments were obtained in New Mexico and

the absence of any showing as to whether or not the judgment obtained in New Mexico becomes a lien upon judgment debtor's property. In the present case this question is answered in the affirmative by stipulation of counsel and by reference to the New Mexico Statutes, Chapter 76, section 110.

The question involved here appears to have been squarely met by this Court in the case of *Northwestern Pulp & Paper Co. v. Finish Lutheran Book Concern*, 51 Fed. (2d) 340. In this case the Court held that an act of bankruptcy is not committed by an insolvent debtor's failure to vacate a judgment that gives rise to a lien at a date prior to the commencement of the four-month period, within at least five days before the date of sale or other disposition of the property of the debtor, said sale taking place within the four-month period. Among other things the Court stated:

“The controlling question presented in this case is whether or not an act of bankruptcy is committed by an insolvent debtor's failure to vacate a judgment that gave rise to a lien at a date prior to the commencement of the four-month period, within at least five days before the date of sale or other disposition of property affected by the judgment, said sale taking place within the four-month period.

If we apply to this definite problem certain fundamental principles of law, as set forth in the statute itself and expounded by numerous courts, we shall find that many of the apparent difficulties of the case will disappear.” . . . “The act of bankruptcy, then, if any was committed in this case, was a violation of clause (3) or clause (4) of section 3(a), 11 U. S. C. A., section 21(a), (3), (4).

A scrutiny of each of these two clauses reveals that the act of bankruptcy therein defined consists of two elements, each of which must be present to bring the debtor within the purview of the statute: (1) The debtor must, while insolvent, suffer or permit a preference to be obtained; (2) he must fail to discharge such preference within a stated time.

The use of the conjunction ‘and’ instead of the disjunctive particle ‘or’ indicates that both elements must concur to constitute an act of bankruptcy. *In re Vetterman* (D. C., N. H.) 14 Am. B. R. 245, 135 F. 443. And both must occur within the four-month period prior to the filing of the petition in bankruptcy. If the lien is obtained before the determining period has commenced to run, and enforcement proceedings are instituted within the four months’ term, a complete act of bankruptcy has not been committed.

That both judgments in this case created valid liens at the time the judgments were docketed is admitted by the appellee in its amended petition. Provision for the obtaining of such liens is contained in the Oregon statute, *supra*.

It next becomes necessary to inquire whether merely permitting, while the debtor is insolvent, a judgment creditor to enforce, within the four-month period preceding the filing of the petition, a valid lien docketed many months in the past, constitutes an act of bankruptcy.

The general principle is thus laid down in Remington on Bankruptcy, sec. 150, vol. 1, p. 199 (3d Ed.): ‘The mere enforcement, within the four months period, of a lien obtained before the four months period, is valid and unaffected.’

The leading case on this subject is that of Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36, 23 S. Ct. 67, 47 L. Ed. 122, in which Mr. Chief Justice Fuller enunciated the following doctrine: ‘* * * Where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized.’

See, also, Thompson v. Fairbanks, 196 U. S. 516, 13 Am. B. R. 437, 25 S. Ct. 306, 49 L. Ed. 577.

The doctrine laid down in Metcalf v. Barker has been recognized or approved in later decisions of the United States Supreme Court. In Glove Bank, etc., v. Martin, 236 U. S. 288, 34 Am. B. R. 162, 35 S. Ct. 377, 59 L. Ed. 583, Mr. Justice Day said: ‘The difference, having the provisions of the act in view, between the beginning of a proceeding to assert liens that existed more than four months before the filing of the petition in bankruptcy, and the attempt to create them by attachment and other proceedings within four months, has been recognized in decisions of this court. In Metcalf v. Barker, * * * a proceeding to give effect to a prior lien existing more than four months before the filing of the bankruptcy petition was held not within the meaning of Section 67(f) of the Bankruptcy Act (11 U. S. C. A., sec. 107, subd. f.)’

See, also, Taubel, etc. Co. v. Fox, 264 U. S. 426, 2 Am. B. R. (N. S.) 912, 44 S. Ct. 396, 68 L. Ed. 770.

District and Circuit Courts have followed this principle for the past two decades. In Colston v. Austin Run Mining Company (C. C. A., 3d Cir.), 28 Am. B. R. 92, 194 F. 929, the court said, with refer-

ence to a foreign attachment lien created before the commencement of the four-month period:

* * * both reason and the weight of authority compel the conclusion that mere failure, while insolvent, to vacate or discharge the lien within the statutory period of four months, and at least five days before a sale or final disposition of the property affected, does not constitute an act of bankruptcy. Priority is obtained when a lien attaches, and not when it is enforced. The date of the sale is immaterial in this respect: whenever it takes place, it relates back to the date when the lien attached.'

In re Deer Creek Water & Water Power Co. (D. C., Pa.), 29 Am. B. R. 356, 205 F. 205, we find the following language:

'It is not sufficient to charge acts of bankruptcy in the language of the statute. (Citing cases.) And the facts appearing from the petition showing sufferance of the enforcement by execution of a lien antedating four months the filing of the petition do not constitute or amount to such.'

See, also, Yumet & Co. v. Delgado (C. C. A., 1st Cir.), 40 Am. B. R. 293, 243 F. 519, citing Metcalf v. Barker; *In re Brinn* (D. C., Ga.), 45 Am. B. R. 74, 262 F. 527; *In re Herlehy Co.* (D. C., N. Y.), 41 Am. B. R. 171, 247 F. 369.

In the case of *In re McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 F. 442, the situation is thus aptly summarized:

'The rendering of a judgment, therefore, can only constitute an act of bankruptcy when (a) the debtor is insolvent, (b) has within 4 months of the filing of the bankruptcy petition suffered and permitted it to be obtained, (c) upon which execution has issued, (d) been levied upon his property, (e) such property ad-

vertised for sale, and (f) he has failed, at least five days before the date fixed for sale, to discharge or vacate the same; and all these prerequisites must occur within four months of the filing of the petition.' (Italics our own.)

So, also, in *Gatell v. Millian* (C. C. A., 1st Cir.), 5 Am. B. R. (N. S.) 340, 2 F. (2d) 365, decided in 1924, *per curiam*:

'The attachment made more than four months prior to the filing of the petition in bankruptcy created a valid lien. * * * The judgment, execution, and sale of the attached land within the four months and prior to the filing of the petition in bankruptcy were in enforcement of the lien acquired prior to the four months period, and were valid notwithstanding the subsequent adjudication.'

See, also, *In re Berlowe* (D. C., N. J.), 5 Am. B. R. (N. S.) 937, 7 F. (2d) 898, decided in 1925, and *Cohn & Co. v. Drennan* (D. C., La.), 10 Am. B. R. (N. S.), 287, 19 F. (2d) 642, decided in 1927, in which latter case the following language was used:

'When such a lien, created by an attachment, has been subsistent beyond four months, the property or money seized by garnishment or other mesne process is not discharged therefrom simply because the judgment necessary for its recognition and enforcement comes of a date within four months of a date when less diligent creditors elect to file bankruptcy proceedings.

'If an inchoate lien such as an attachment is given such validity if obtained prior to the four-month period, a fortiori a judgment lien, representing a complete right, should be accorded at least as much weight.' . . . 'Some confusion has arisen as to the interpretation of the case of *Citizens' Banking*

Company v. Ravenna National Bank, 234 U. S. 360, 32 Am. B. R. 477, 34 S. Ct. 806, 58 L. Ed. 1352. This case, which is relied upon heavily by the appellant, supports the latter's contention only indirectly. In fact, it is likewise cited by the court below to sustain a contrary view.'

The difficulty probably arises from the fact that the Ravenna case did not involve the same facts as does the instant suit. There the act charged was that the alleged bankruptcy, within four months next preceding the filing of the petition, and while insolvent, (a) suffered and permitted the Citizens' Banking Company to recover a judgment against her, and to have an execution issued and levied thereunder, whereby the company obtained a preference over her other creditors, and (b) at the time of the filing of the petition, which was one day less than four months after the levy of the execution, she had not vacated or discharged the levy and resulting preference. No reference was made to a date of sale, within five days before which date she would have been obliged to vacate the levy if she wished to avoid an act of bankruptcy.

It will be noted that in the Ravenna case, all the acts complained of were committed within the four-month period. The Supreme Court held that mere inaction by an insolvent debtor for four months after the levy of an execution upon his real estate did not constitute an act of bankruptcy. The interpretation of the Ravenna case has already been given by this court. Larkin-Green Logging Co. v. Sabin (C. C. A., 9th Cir.), 35 Am. B. R. 86, 222 F. 814.

In the instant case, on the other hand, there were dates of sale under both judgments, from which dates the five-day period for discharging the preferences

might have been computed. Both judgments, however, were created into liens on the debtor's property before the commencement of the four-month period, and were therefore unquestionably valid.

But even in the Ravanna case, which, as we have said, did not present facts parallel with those at bar, the Supreme Court did use, on pages 364 and 365 of 234 U. S., 34 S. Ct. 806, 808, language that sustains the general principle by which we are being guided here:

'Looking at the terms of this provision (Section 3a(3) of the Bankruptcy Act), it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution, or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision.'

Conversely, it may logically be argued that the first and third elements alone (namely, insolvency and failure to vacate the preference) do not suffice to

constitute an act of bankruptcy, even though both have occurred within the four-month period. If the alleged preference (*i. e.*, the docketing of the judgment) was obtained more than four months prior to the filing of the petition, this fact deprives the alleged act of bankruptcy, all of which must be committed within the four-month period, of one-third of its essence. Under such circumstances, there is no act of bankruptcy at all.

Counsel for the appellee contend that if the adjudication is set aside certain creditors of the alleged bankrupt will thereby be able to secure title to property to the exclusion of the other creditors, and that thus the estate will be dissipated. This is unfortunate, of course, but it must be remembered that the two judgments referred to were obtained during the year 1929, long prior to the time the creditors herein filed their original petition; and that they did nothing to protect their interests, and were neither diligent nor timely in asserting their rights, notwithstanding the fact that the proceedings, including the filing of the suits, the recording of the judgments, the levies and the sales, were all matters of public record."

From a reading of the foregoing case and in fact from the reading of the Bankruptcy Act itself, it appears well established that the Act deals with liens obtained upon any property of the debtor through legal proceedings, and that once this has occurred in an action wherein the judgment has become a lien, and has permitted the four-month period therefrom to have expired, then the right to have the procurement of a lien upon such judgment as an act of bankruptcy has been exhausted. This being true, the Court did not err in sustaining the objection to the petitioner's offer.

POINT II.

The Trial Court Did Not Err nor Commit Reversible Error in Admitting Petitioning Creditors' Offer to Receive in Evidence for Limited Purposes the Exemplified Record of Youngblood v. Dysart.

The Court did not, as appellants state in their opening brief on page 13, refuse the offer of exhibit, but on the contrary admitted it for limited purposes [Tr. p. 210]. wherein the Court said: "Let us withhold ruling on that at the present time. You have the stipulation and I will overrule the objection to the document which you identify," and on page 211 the Court further stated: "All right I receive that only as material so far as it shows as a fact that real property existed at the time of the judgment to which the lien would attach." In addition to this point counsel for the appellant stated to the Court below in reference to the Youngblood offer:

"Mr. Turnbull: —showed existence of real property in New Mexico in the name of Stella Dysart showing a mechanic's lien thereon and a sale, execution sale, an order approving the sale as made by the District Judge, I offer that in evidence for the purpose of showing that there was real estate.

Mr. Casey: The only objection I have there is that in one of these petitions this is cited as an act of bankruptcy. If this is introduced it might possibly be used to substantiate that. I am objecting to that alleged act of bankruptcy. 1st. It is not a lien procured by legal proceedings, as a mechanic's lien.

Mr. Turnbull: I agree it does not constitute an act of bankruptcy, and it is not offered for that purpose. The petitioning creditors at this time will not rely upon the Youngblood proceedings."

Under these circumstances we respectfully state that the Court made no error in this ruling on the offer of the Youngblood record.

POINT III.

The Trial Court Did Not Commit Reversible Error in Denying to Petitioning Creditors the Right to Prove Insolvency and the Right to Prove Their Status as Creditors and to Prove the Nature, Amount and Extent of the Indebtedness of Stella Dysart, and in Dismissing the Bankruptcy Proceedings.

The ruling of the Court in denying the offer of proof made by the petitioning creditors relative to the insolvency of Stella Dysart, and the claims of the petitioning and intervening creditors, was made at the instance of the parties to these proceedings, and in order to obviate what would otherwise have been a useless presentation to the Court of some fifty-two petitioning and intervening creditors. In view of the ruling of the Court as to a controlling feature of the case, to-wit, the existence of an act of bankruptcy and its ruling that there was no act of bankruptcy presented by the petitioners, certainly there could be no error in the Court acquiescing in the procedure proposed by both the appellants and the appellee. And we respectfully submit that in addition to the form of the offer of proof as made by the appellants, if it had been properly presented and accepted by the Court, could not have changed the outcome of this action.

Wherefore, the appellee herein respectfully submits that the judgment of the Court herein below should be affirmed, and that the rulings of the Court complained of by the appellants were not erroneous, and that the order dismissing the proceedings herein should be affirmed.

Respectfully submitted,

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